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REPORTS
OF
CIVIL AND CRIMINAL CASES
DECIDED BY THE
COURT OF APPEALS
OF KENTUCKY.

VOLUME XV.
EDWARD W. HINES, REPORTER.

VOLUME 97—KENTUCKY REPORTS,
CONTAINING CASES DECIDED FROM FEB. 21, 1895, TO SEPT. 15, 1895.

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‡Appointed by Governor March 18, 1896, to fill, temporarily, the vacancy caused by death of Hon. John R. Grace.

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*Elected in November, 1895, to fill, for the remainder of the term, the vacancy caused by the resignation of Hon. John R. Grace, that vacancy having been filled, temporarily, by the appointment of Hon. L. C. Linn.

†Appointed by Governor January 6, 1896, to fill, temporarily, the vacancy caused by death of Hon. W. L. Jackson.

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*Appointed by Circuit Judge in December, 1895, to fill, temporarily, the vacancy caused by resignation of C. J. Bronston.

†Appointed by Governor January 15, 1896, to fill, temporarily, the vacancy caused by resignation of C. W. Lester.

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In Memoriam.

JOHN R. GRACE,

Died February 20, 1896.

When the Court of Appeals convened February 25, 1896, Chief Justice Pryor presented for the Court the following resolutions:

On assembling this morning we find a seat vacant on our bench.

The grim reaper, Death, has taken from us our associate and brother, John R. Grace. Although with us but a brief period of time, by his mild and gentle manner he endeared himself to every member of this court. In the consultation room his clear statement in the exposition of the law gave undoubted evidence of his ability and learning as a judge. He was on the Circuit Court bench for twenty-six years, and coming to this bench with a ripe experience of lawyer and judge, his associates always gave to his views on legal questions the greatest consideration. No court ever lost a member whose judicial career was purer than that of our beloved associate.

Judge Grace was born in Trigg county in 1834. Elected to the Circuit Court bench in August, 1868, and four times in succession thereafter, he continued to hold that position until he resigned it in 1894 to accept a place on this bench, on the first Monday in January, 1895, having been elected to the position in November, 1894. He died in Frankfort, February 20, 1896, thus closing a judicial career of over twenty-seven years.

As an evidence of the sense of loss felt by his associates, and by the bar of the State, this memorial is ordered to be entered upon the records of this court.

After appropriate remarks the resolutions were adopted by a rising vote of the bar and were ordered to be spread upon the records of the court; and the court then adjourned out of respect to the memory of Judge Grace.

DECISIONS
OF THE
COURT OF APPEALS OF KENTUCKY.

JANUARY TERM, 1895.

CASE 1—PETITION EQUITY—FEBRUARY 21.

McCallister v. Bethel.

APPEAL FROM HENDERSON CIRCUIT COURT.

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1127 526

CONSTRUCTION OF DEVISE.—Where an estate is given or devised generally or indefinitely with a power of disposition the fee passes, and a remainder to take effect in the event the estate is not disposed of is void. It is only where the interest of the first taker is expressly limited to a life estate that the power of disposition does not carry the fee, and that the remainder can take effect in the event there is no disposition of the estate by the first taker.

Under a devise of land to A in trust for B and at B's death to his children, if any, but if none, then to any person to whom B may devise it, there being nothing in the language creating the trust indicating an intention to limit B's interest to a life estate, he takes the fee subject to be defeated only in the event of his dying leaving children; and if he dies leaving no child and without disposing of the property, it passes to his heirs and not to the residuary devisees under the will.

YEAMAN & LOCKETT FOR APPELLANT.

Joseph McCallister took a defeasible fee and not a life estate merely.

Where an estate is given to a person generally or indefinitely with a power of disposition, it carries a fee, and the only exception to the rule is where the testator gives to the first taker an estate *for life only by certain and express words* and annexes to it a power of disposal. (Herbert v. Herbert, 85 Ky., 134; McCullough's Adm'r v. Anderson, 90 Ky., 126; Jackson v. Robbins, 16 John., 587; Caleb v. Field, 9 Dana, 347; Coats' Ex'or v. L. & N. R Co., 929 Ky. 263; Henderson v. Hall, 80 Ky., 91; Pate v. Barrett, 2 Dana, 427.)

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McCallister v. Bethel.

MONTGOMERY MERRITT & A. T. DUDLEY FOR APPELLEE.

Joseph McCallister took only an estate for life in the farm devised to J. E. McCallister in trust for him. (*Pate v. Barrett and wife*, 2 Dana, 426; *Caleb v. Field*, 9 Dana, 345; *Coats' Ex'or v. L. & N. R. Co.*, 92 Ky., 263; *Anderson v. Hall*, 80 Ky., 91; *McCullough's Adm'r v. Anderson*, 90 Ky., 126; *Herbert's Guard'n v. Herbert's Ex'or*, 8 Ky. Law Rep., 752.)

JUDGE PAYNTER DELIVERED THE OPINION OF THE COURT.

Ben Talbot owned a large estate and the appellee, Maria Bethel, is his only child. Joseph McCallister was his wife's nephew, and a very improvident and intemperate man.

Joseph McCallister owned three good farms of about one hundred and fifty acres each. He became involved, principally by security debts, in amount approximating seven thousand dollars.

On the 2d day of August, 1877, in consideration of seven thousand dollars, all of which, except four hundred and two dollars and ninety-eight cents, was to be applied to the payment of his debts, Joseph McCallister conveyed to Ben Talbot his three farms, together with a large amount of personal property. He surrendered possession of two of the farms, but retained, with the consent of the grantee, possession of one of them, known as the "Warfield farm." He occupied and used it as his own from the date of the deed until the death of Ben Talbot, which occurred in 1884. The record shows that the property which Talbot obtained under his deed from Joseph McCallister, outside of the Warfield farm, fully reimbursed him for the money he had paid.

The evident purpose of Ben Talbot was not to profit by the misfortunes of his wife's nephew, but to assist him in retaining a part of his estate for his use and enjoyment.

On the 6th of September, one month and four days after

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Joseph McCallister made him the deed, Ben Talbot made his will, containing three clauses.

By the first, after the payment of his funeral expenses, debts, etc., he gave the appellee, Maria Bethel, his money and the proceeds of his personal property, which was to be sold by his executors.

By the third clause he gave the residue of his estate, of whatsoever kind, to her during her natural life and then to the children of her body.

The interpretation of the second clause of the will is involved in this action. It reads as follows:

"I will and devise to John E. McCallister my Warfield farm, lying in the point above the mouth of Green river, in Henderson County, Ky., next adjoining the lands of John E. McCallister, containing about one hundred and fifty acres, more or less, in trust for Joseph McCallister. He shall have power to rent out the farm and collect the rents and pay them out for the support and maintenance of said Joseph McCallister, or he may, if he thinks best, rent the farm to said Joseph, but I wish and order that the farm, or its proceeds, shall never be liable for any debt of said Joseph's, contracted without the consent of said trustee, and if any creditor of said Joseph shall garnishee or attempt to stop the rent or money so that it will not go to the maintenance of said Joseph, I will and order the trustee to stop the payment to such creditor, and I order him to pay it out for the support and maintenance of said Joseph, accordingly as Joseph may need it. I further will and devise this farm, after the death of Joseph McCallister, to the children of Joseph McCallister, if he has any, but if he has no heirs of his body it shall pass or go to any person said Joseph may will and devise it to and it shall be theirs forever."

Joseph McCallister died intestate and without children.

The question is whether the farm goes to the appellee, Maria Bethel, and her children, under the will of Ben Talbot, or to the nearest of kin of Joseph McCallister, who are the appellant and the appellee, Maria Bethel. If the will of Ben Talbot had simply carved out of the fee a life estate for Joseph McCallister, then he having died without children, and having made no will, the farm would go to the residuary devisees under the will of Ben Talbot.

In construing a will we should always have in mind the purpose and intention of the testator and effectuate that.

The testator having the right of disposition of the estate he has accumulated, his desires should be followed as far as the law will allow.

Out of his abundance Ben Talbot had munificently provided for his daughter and her children. His kindly interest in his wife's unfortunate nephew lingered with him until the last, as is evidenced by his will. He was evidently a just man, because, when he found himself repaid the sums he had expended for Joseph by the acquisition of two of his farms, he permits Joseph to retain the use of the third, and secured it to him by the terms of his will. Who can doubt that Ben Talbot had the desire to be just, as well as benevolent, with Joseph McCallister when he thought of disposing of his estate?

However, it is not necessary to consider any of the facts surrounding the previous ownership of the farm in order to determine what was the intention of the testator.

The farm is willed to John E. McCallister in trust for Joseph. There is no word or phrase in the language creating the trust to show that he was taking only a life interest in the land. It was given in trust to him generally—in fee.

There seems to be no term that can be employed which expresses the character of estate which he took so well as

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to say it was a defeasible fee; that is to say, he was vested with the fee, and his right thereto could only be defeated upon the happening of the event of having bodily heirs. The event never having transpired, he retained the fee. There is no expression or word used which requires the trustee to give Joseph the rents during his life, so as to indicate an intention upon the part of the testator that he was to have only a life estate in the land. It is perfectly manifest from the will that the testator knew how to create a life estate in a devisee, as in the first clause of the will he gives his daughter absolutely his money and proceeds of his personal property ordered to be sold, and in the third clause he gives her a life estate in his realty and the remainder to her children.

Had he intended that Joseph should only take a life estate in the farm he would have said so, as he did in the case of his daughter. Had he intended that his daughter and her children should take the Warfield farm as his residuary devisees he would have said that in the event of Joseph having no bodily heirs that then it was to go to his daughter and her children. As a further evidence of the fact he did not so intend that they should take the Warfield farm as such devisees he provided, in case the event did not happen which would divest Joseph of the fee, that the farm should pass "to any person said Joseph may will and devise it to, and it shall be theirs forever."

Having given Joseph the fee it was wholly unnecessary for the testator to emphasize the fact by trying to confer upon him the right to will the farm to whomsoever he pleased. The right to so dispose of the farm was incident to the estate which the testator gave him, and no further words were necessary to be employed to enable him to do so, unless he had bodily heirs. It is quite unusual for opposing counsel

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to cite the same cases decided by this court to sustain their respective positions. The cases which they cite are uniform and certain in announcing the same doctrine. We will refer to some of them to show the facts are quite different from what they appear to be in this case, and that the conclusions reached are in harmony with the principles therein announced.

In McCullough's Admr. v. Anderson, 90 Ky. 126, the testator willed to his wife during her life all his estate, with ample authority to dispose of the whole of it as she pleased. If at her death she had made no testamentary disposition of it then the remainder was to go to certain persons. The testator's wife was given the life estate, with the right, if she chose to exercise it, to defeat the remainder. She did not choose to exercise it, and the court held that the estate went to those to whom it was given in remainder, and not to her heirs.

In the case of Coats' Ex., v. L. & N. R. Co., 92 Ky., 263, it appears that Matthew H. Coats devised his estate to his wife, Beulah Coats, with absolute power to sell during her life. At the death of his wife such of his estate as remained unexpended was specially devised to various persons.

The court held that the wife only took a life estate.

In Pate v. Barrett, 2 Dana 426, the testator devised to his sister, Janet Crawford, a mulatto girl, Nelly, during her life, and at her death the devisee to leave Nelly to any of her children she saw proper, or to free her by emancipation, as she pleased. The court held that she only took a life estate in Nelly, with power to dispose of her, but as it was never exercised Nelly reverted to the testator.

We do not deem it necessary to make any reference to other cases cited by counsel. The cases to which attention are called herein in effect decide that when the testator de-

vises his estate to one for life, with power to dispose of it by will or deed, and that power is not exercised, the estate in remainder (if one has been created by the will) has not been defeated, or if there is no estate in remainder created by the will and the life tenant fails to exercise the power of disposition then it reverts to the estate of the testator.

But the court in the case of *Herbert's Gdn. v. Herbert's Ex., etc.*, 85 Ky. 149, said: "It might be well argued that a devise to a stranger for life with such an unlimited power of disposition would pass the fee."

In *McCullough's Admr. v. Anderson*, *supra*, Judge Pryor, in delivering the opinion of the court, said:

"After a careful review of all the authorities to which our attention has been called, the rule sanctioned and followed is this: If the estate is given or devised generally or indefinitely with a power of disposition, it passes a fee, but when the devisor or grantor owning the fee gives to the first taker an estate for life, with the power to dispose of the fee, no greater estate is vested in the first taker than that carved out of the fee and vested in him by the devisor or grantor. He is given a life estate in express terms, and the failure to exercise the power gives to the remainderman the fee, because no disposition having been made of it by the life tenant, he takes under the will or conveyance. It is said 'if an estate be given to a person generally or indefinitely, with a power of disposition, it carries a fee, unless the testator gives the first taker an estate for life only, and annexes to it a power of disposition. In that case the express limitation for life will control the operation of the power and prevent it enlarging the estate into a fee.' (4 Kent's Commentaries, 535-536)."

We are of the opinion that the legal estate in fee was held

McCallister v. Bethel.

in trust for the immediate devisee, Joseph McCallister, with the power of disposition annexed in the event he died without bodily heirs.

The devisor reserves no interest to himself or to his heirs in the realty devised, and there is no contingency upon which it is to revert; but on the contrary, his plain intent was to divest himself of title, passing it to the trustee with a limitation upon the power of disposition by the beneficiary in the event he died leaving children.

The distinguishing feature between a life estate with the power of disposition, and an estate where the fee passes to the immediate devisee, subject to be divested upon the happening of a contingency, is that when an estate for life is expressly given and the power of disposition not exercised by the life tenant, all his interest in the estate ceases at his death, but when the fee is given in the first instance, as in this case, and the contingency upon which the title is to be divested or restricted never happens, then at the death of the person holding the fee the estate devised passes by descent to his heirs at law if not disposed of by will, and the attempt to limit the power of disposition by will only becomes nugatory.

Joseph McCallister dying without children, the farm passes, by descent, to his heirs at law.

Judgment reversed with direction that further proceedings be had consistent with this opinion.

CASE 2—PETITION ORDINARY—FEBRUARY 21.

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Memphis & Cincinnati Packet Co. v. Nagel.

APPEAL FROM M'CRACKEN COURT OF COMMON PLEAS.

1. **CARRIERS—PUNITIVE DAMAGES.**—Where a common carrier accompanies his violation of contract with a passenger with wilful and wanton oppression or violence, or unlawful personal restraint, or conduct insulting in word, tone or manner, he becomes liable to all the remedies of the law against tort-feasors, including the liability to pay punitive damages.

In this action against a packet company, a common carrier, to recover damages on account of defendant's failure to stop its boat and put plaintiff off at the place for which she had purchased and presented a ticket, and finally putting her off at a strange place, the court properly gave an instruction telling the jury in substance that they might find for plaintiff punitive damages if they believed from the evidence that the act of defendant was wilful, or the result of gross neglect, or that the conduct of defendant's employes was insulting either in manner, words or tone, there being testimony tending to show such was the fact.

2. **SAME.**—A corporation as well as a natural person may be held liable in punitive damages for injuries inflicted by the tortious acts of its employes committed within the scope of their authority.
3. **MEASURE OF DAMAGES.**—It was proper for the court to authorize the jury to consider in estimating damages such bodily and mental suffering as was proximately caused by the acts of defendant.
4. **THE CONFUSION IN THE ORDER OF ARGUMENT OF COUNSEL TO THE JURY** is not of sufficient importance to authorize the court to set aside the verdict.

CAMPBELL & CAMPBELL FOR APPELLANT.

1. This was an action for breach of contract, and even though the failure to perform was wilful, it was error to give an instruction authorizing punitive damages. (1 Sedgwick on Damages, (8 ed.), vol. 1, sec. 370; *Idem*, sec. 98; *Idem*, vol. 2, sec. 864; Schouler on Bailments and Carriers (2d ed.) sec. 636; 5 Lawson's Rights, Remedies and Practice, p. 4306; Miles v. Miller, 12 Bush, 134; 4 Am. Railroad and Corporation Rep., p. 659; 5 Am. and Eng. Ency.

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- of Law, p. 21; Walsh v. Chicago, &c., R. Co., 42 Wis., 23; Ky. Cent. R. Co. v. Dills, 4 Bush, 593; Duche v. Wilson, &c., 9 Hun., 519; Grand Tower Co. v. Phillips, 23 Wall, 471; Toledo, &c., R. Co. v. Roberts, 71 Ill., 540; 1 Sedgwick on Damages (7th ed., 45); Hamlin v. Great Northern Ry. Co., 1 H. & N., p. 408.)
2. Exemplary or punitive damages should not be allowed against a corporation for the acts of its servants, unless it expressly authorized the act as it was performed, or afterwards ratified it, or was negligent in hiring the servant, or retaining him in its employ. (1 Sedgwick on Damages (8th ed.), sec. 380; Hutchinson on Carrier's, sec. 814, *et. seq.*; 2 Am. and Eng. Ency. of Law, p. 754; 2 Wait's Actions and Defenses, p. 448.)
 3. The court erred in allowing plaintiff to both open and conclude the argument.
 4. The court should not have submitted to the jury as an element of damage the sickness of defendant or mental distress. (12 Ky. Law Rep., 555.)

W. D. GREER AND CHAS. K. WHEELER FOR APPELLEE.

1. Exemplary damages may be recovered for breach of contract by a common carrier of passengers where there is oppression, fraud, malice, insult, or other wilful misconduct evincing a reckless disregard of consequences. (Dawson v. L. & N. R. Co., 6 Ky. Law Rep., 668; Miles & Miller, 12 Bush, 135; L. & N. R. Co. v. Ballard, 10 Ky. Law Rep., 735; L. & N. R. Co. v. Jenkins, 15 Ky. Law Rep.; 2. Sedgwick on Damages (8th ed.), p. 244; Cincinnati R. Co. v. Richardson, 14 Ky. Law Rep.; L. & N. R. Co. v. Wilkinson, 15 Ky. Law Rep., 92; Dodge v. Barton, 28 Cent. L. J., 186; Thompson on Negligence, p. 1264; Samuels v. Richmond & Danville R. Co., 23 Am. St. Rep., 883; Dorroh v. Ill. Cen. R. Co., 7 Am. St. Rep., 629; Caldwell v. Richmond & Danville R. Co., 89 Ga., 550, 553; Chattanooga R. Co. v. Lyon, 89 Ga., 16; 28 Am. St. Rep., 877 and authorities there referred to.)
2. If there was anything prejudicial to defendant in the order of the argument, its objection and exception came too late.
3. The court properly allowed the jury to consider the plaintiff's illness and suffering as an element of damage in making up their verdict. (Sedgwick on Damages (8th ed.), vol. 1, 208.)

JUDGE GRACE DELIVERED THE OPINION OF THE COURT.

The appellee was a passenger on the steamer Buckeye State, belonging to the Memphis & Cincinnati Packet Company, and employed by them in the passenger trade as a common carrier between Memphis, Tenn., and Cincinnati,

Ohio, appellee taking passage at Paducah, Ky., for New Albany, Ind., paying the fare demanded and securing her ticket to that place. These facts are admitted by the pleadings. The captain of the steamer refused to land at New Albany and permit appellee to get off his boat, but against her earnest protest and entreaty carried her against her will and consent beyond New Albany, Ind., and put her ashore on the Kentucky side of the river, at the mouth of the canal, in or near Portland, Ky., a place wherein she had neither relative nor friend nor acquaintance, in the outskirts of a city unknown to her. The facts of the case are fully and correctly recited in the opinion of the Superior Court of Kentucky, that tried this appeal from the McCracken Court of Common Pleas, and may be found in 15 Ky. Law Rep., p. 742, to which reference is made, and need not be more specifically recited here. The Superior Court affirmed the judgment of the lower court, which was for \$900, in favor of appellee, based on the finding of the jury that tried the cause, same being certified to this court on further appeal by appellant.

The court below gave to the jury two instructions, one in the usual form, defining a state of case wherein plaintiff might recover the actual damages sustained, the other wherein she might, if the jury found the state of case as submitted, recover exemplary or punitive damages; and it is of this last-named instruction that appellant specially complains, its contention being this, that this suit being founded on contract, and not in tort, the law does not authorize any verdict against appellant beyond actual damages, that is, compensation for the injury actually sustained. It may be said of all cases of this kind that they belong to that class of cases that sound in damages. Such is plaintiff's contention, clearly stated, reciting the acts of defendant

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on which she bases her claim, that is the wrongful and unlawful carrying of her person, against her will and protest, beyond her destination, accompanying same with rough language, insulting in its tone and manner. Issue being joined on these averments, plaintiff placing her damages at \$1,995, of course not intending to say that her actual damages sustained, as estimated by courts and juries under the law, amounted to so much, but relying not only on the wrongful act done and committed against her person, but upon the manner as well, as also the time and place and the circumstances thereof, saying same was wilfully and wantonly done, done recklessly, disregarding her rights, thus clearly indicating to appellant her claim for punitive damages. Her case was thus properly stated and issue duly joined thereon.

It may be said that while the contract between the plaintiff and defendant for passage on their steamer from Paducah, Ky., to New Albany, Ind., was necessary to be stated and must have been proven if denied (which it was not), it served chiefly and primarily to fix the status of the parties, the one to the other, plaintiff as the passenger and defendant as the common carrier, this being all that was actually done in this case, no special contract being made, but the whole matter being then left to the law to imply—or rather to fix and declare—what were the respective rights of the parties under the relations thus created—as thus to transport her as a passenger with the highest practical degree of care used by prudent and careful persons engaged in such business, as expeditiously as the mode of travel permitted, to protect her during the voyage from injury and insult, even from obscenity, from strangers as well as from the servants of the company, and finally to land the steamer at the usual place of landing at New Al-

bany, Ind., and to give her a reasonable and safe opportunity to leave said boat.

In all this contract implied by law from this relation established, there is nothing inconsistent with the reservation of every other personal right that the law in all places and at all times accords to every person, as the freedom of the person from assault; from injury, from unlawful detention, from every species of violence, unlawfully and wrongfully inflicted; and thus it is that cases of this character against common carriers pass so easily from the usual limitations and restrictions of ordinary contracts and range themselves under the law of torts. So that while the common carrier is under an implied contract to do certain things, he may yet easily go beyond the limitations and duties of his contract and become at one and the same time and by one and the same act a violator of his contract and a tort-feasor, and if passing the limits of or making default in his contract, he accompanies his wrongful action by wilful and wanton oppression, or uses violence or unlawful personal restraint, or accompanies his wrongful act toward his passenger with conduct insulting in word, tone or manner, he becomes liable to all the remedies of the law against tort-feasors, including this liability to pay punitive damages in cases where same may be lawfully adjudged.

All this results from sound considerations of public policy, from the high degree of protection necessary to be thrown around persons who for the time being are so completely within the power and control of common carriers, especially by railway or by steamboat. For the time being the captain of the steamer is all powerful; his word is the law; there is none to resist him. But he must exercise this power for good, not for evil; he must exercise it lawfully, and if he fails to do so his master, the company,

whose servant he is, must answer in damages. They must answer, though an artificial person, a corporation, in the same way and manner, and to the same extent, as a private individual who may be a common carrier. This was well said by the Superior Court in this case. Hence it is that in all these cases the common carriers are held responsible for punitive damages in cases falling within the line above designated, as in actions of tort.

This instruction complained of, after submitting to the jury that they must find the actual damages sustained by reason of plaintiff being carried beyond her destination, said further:

“And if they believe from the evidence, that the failure of the defendant’s employes in charge of said boat, to put plaintiff off at New Albany, was wilful, or the result of gross or wanton or intentional neglect, on the part of defendant’s employes, in the discharge of their duties, to carry her and her trunk, and put them off, or that the conduct of defendant’s employes was insulting toward plaintiff either in manner, word or tone, they may assess the damages at any sum which they may believe from all the evidence in the exercise of a sound discretion the plaintiff ought to recover, not exceeding the amount claimed.”

This, we think, is a fair statement of the law which, if supported by the facts upon which it is based, authorizes the awarding of exemplary damages by the jury.

Appellant contends further that exemplary damages should not be awarded against a corporation for the acts of its servants unless it expressly authorized the act as it was performed, or afterwards ratified it, or was negligent in employing its servant or in retaining him in its employ. And for this he quotes Mr. Sedgwick on Damages, vol. 1, sec. 380. True, the learned author says such a rule ob-

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tains in many jurisdictions. Fortunately it has never obtained in Kentucky, and we are not now so impressed with its soundness or authority as to undertake to engraft it on our jurisprudence. Of little value to the injured and outraged passenger would all other declarations of law be if this rule obtained as stated.

The later and better rule seems to be that corporations are liable for the acts of their servants committed within the scope of their employment, as by the master of a steamboat or the conductor of a railway, with reference to their passengers. This rule has often been applied in Kentucky.

As to the evidence submitted by plaintiff to the jury on this trial, it is sufficient to say that it tended to establish the allegations made in plaintiff's petition, and if so, the court was authorized to submit it to the jury. They were then the sole judges of its value and sufficiency.

As to the bodily and mental suffering and the spell of sickness resulting to plaintiff by reason of the wrongful act of the defendant in taking her beyond her destination, this was submitted to the jury for consideration only on the condition that it was true in point of fact, and that it was proximately caused by said acts of defendant. The attending physician was of this opinion, and so testified, as well as plaintiff and other members of the family. Neither do we think the confusion in the argument by the several counsel of this case in the court below is, on the facts as stated in the bill of exceptions, of sufficient importance to set aside a verdict just and proper under all the facts of the case.

In support of the general doctrines announced herein we refer to *Louisville & Nashville R. Co. v. Ballard*, 85 Ky., 307, and to the same case on a second appeal, 88 Ky., 159; *Dawson v. L. & N. R. Co.*, 6 Ky. Law Rep., 668;

Western District Warehouse Co. v. Hayes.

Samuels v. Richmond & Danville R. Co., 28 Am St. Rep., 883; Spellman v. Richmond & Danville R. Co., 28 Am. St. Rep., 858.

Judgment affirmed.

CASE 3—PETITION ORDINARY—FEBRUARY 23.

Western District Warehouse Co. v. Hayes.

APPEAL FROM GRAVES COURT OF COMMON PLEAS.

1. A STOCKHOLDER IN A CORPORATION MAY TESTIFY IN CHIEF FOR THE CORPORATION after persons having no interest in the corporation have given testimony in chief in its behalf, as the word "person," as used in sub-section 4 of section 606 of the Civil Code, is to be regarded as synonymous with party to the action.
2. CUSTOM.—In this action to recover the value of tobacco destroyed by fire while on storage in defendant's warehouse, the plaintiff's case being based upon an alleged custom which made it the duty of the defendant to keep the tobacco insured for plaintiff's benefit, the plaintiff can not recover if he was notified that the tobacco was held subject to his risk, even if the custom might otherwise have applied, and the defendant upon the return of the case should be allowed to make that defense and the jury instructed accordingly.

W. S. BISHOP AND W. D. GREER FOR APPELLANT.

1. The custom proved by plaintiff does not apply to the facts in this case.
2. To make proof of a custom admissible for the purpose of affecting a contract the custom must be of such age, such uniformity of observance, such certainty and fixedness of character, and of such notoriety, that a jury would feel clear in saying that it was known to the party sought to be affected by it and that he contracted in reference thereto. (Huston, et al., v. Peters, &c, 1 Met., 562; Caldwell, &c., v. Dawson, 1 Met., 125; Bowling v. Harrison, 6 How., 317; Citizen's Bank, of Baltimore, v. Graffin, 1 Am. Rep.; Eagle Distilling Co. v. McFarland, 14 Ky. Law Rep., 861.)
3. A custom may be used to explain the meaning of words used in contracts, written or oral, but not to add to or modify the con-

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tract. (Howard v. Kellogg, 77 U. S., 987; Adams v. Otterback, 15 How., 539; 19 Am. St. Rep., 635; 11 Am. St. Rep., 632 and note; 8 Am. St. Rep., 771; Hopper v. Sage, 10 Am. St. Rep., 819; Thompson v. Riggs, 6 Wall., 677.)

4. It was not error to permit the stockholders of the corporation to testify in chief after the corporation had introduced other testimony in chief. (Central Pass. Ry. Co., v. Wahle, &c., 13 Ky. Law Rep., 463; Smith v. Owenton, &c., T. R. Co., 14 Ky. Law Rep., 924.)

SMITH, ROBBINS & THOMAS FOR APPELLEE.

1. The alleged custom as to the insurance of tobacco by warehousemen is established by the evidence.
2. Stockholders in a corporation who testify for the corporation are to be regarded as testifying for themselves within the meaning of sub-section 4 of section 606 of the Civil Code, and therefore the court did not err in this case, in excluding such testimony after the corporation had introduced other testimony for itself in chief. (10 Bush., 295; D. B. Bayless Store Co. v. McCarthy's Assee., 15 Ky. Law Rep., 302.)
3. The excluded evidence would have been cumulative merely and therefore its exclusion was not prejudicial. (10 Ky. Law Rep., 975; 10 Bush., 643.)

JUDGE GRACE DELIVERED THE OPINION OF THE COURT.

Appellant complained of the action of the lower court, in refusing to hear the testimony of three witnesses offered by it in chief on the trial, viz.: R. H. Gardner, W. L. Hunt and A. C. Taylor, it being shown that each one was a stockholder in the defendant corporation, and that their testimony was not offered until after it had introduced in chief a witness by the name of Blalock, who was not a stockholder. The materiality of the evidence offered is shown and exceptions duly taken.

We think this ruling of the lower court was error. Stockholders of a corporation who may be offered as witnesses in behalf of the corporation do not come within the inhibition against persons testifying in chief after other testimony in chief has been offered, supposed to be contained in the fourth sub-section of sec. 606, Civil Code. This sec-

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cion reads: "No person shall testify for himself in chief in an ordinary action after introducing other testimony for himself in chief." * *

The word person as used in this sub-section is manifestly synonymous with party to the action. The whole section indicates and refers to what a party may and what a party may not do, as that he shall not testify for himself in chief after introducing other testimony for himself in chief.

Of course the warehouse company, being but an artificial person (a fiction of the law), had not testified, could not testify.

Who can control this order of testimony other than a party to a suit? It is not within the power or authority of witnesses, nor of persons not parties, to suggest or control this matter. Neither of these witnesses offered to be introduced was a party. They had not introduced anybody to testify in the case, neither could they do this, simply because they were stockholders in the corporation. They were not parties to the suit, neither, indeed, could they be. This right of suit or defense is in the body corporate, the artificial person, created under the law by the act of incorporation, and that corporation managed by its board of directors and officers selected for that purpose was and is the only party sued in this case. By their charter they are known as the Western District Warehouse Company, and by that name they are authorized to sue and may be sued.

The record in this case shows that defendant before offering these three witnesses had introduced the president, the vice-president and chief clerk of said corporation.

To refuse the defendant the benefit of the testimony of the witnesses offered, being stockholders, simply because the said corporation had introduced some one else not a stockholder, is not supported either by the letter or spirit

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of the section in question, and there is no necessity of extending the provision of the code beyond the lines indicated.

Another error of which appellant complains is that the court refused instruction B offered by it.

Same is as follows: "The court instructs the jury that if they believe from the evidence that the defendant's agent notified the plaintiff or apprized him that his tobacco, turned over and sued for in this case, was at the warehouse at his, the plaintiff's, risk, and the plaintiff acquiesced therein or made no objection thereto, then the law is for the defendant, and the jury should so find, although you may believe that there was a custom of the trade in the Mayfield market that the warehouse should cover said tobacco by insurance."

This instruction contains a sound principle of law, this suit being filed to make defendant liable for certain tobacco destroyed by fire, while held in its warehouse, and upon the allegation that there was a custom in said trade at Mayfield that the warehousemen should insure the tobacco of their customers, and that this tobacco had been deposited and stored with the appellant under and with reference to said custom. This allegation was made by plaintiff in an amended petition, and pending a demurrer, which was then overruled. It required this allegation to make his petition good. that the contract under which defendant held tobacco was made with reference to said custom.

So then, although such a custom did exist, yet if the parties made another contract without reference to the same and different from said custom, or if defendant, before the burning of the tobacco, notified plaintiff that it was not insuring said tobacco, but was holding same at his, plaintiff's, risk, and thereupon plaintiff made no objection, but ac-

quiesced in same, then he ought not to recover. The defendant gave in evidence this notice or statement to plaintiff, and it should be entitled to this defense. We do not find, however, that the defendant had set out said notice or agreement in its answer, and this was doubtless the reason of the refusal of the court of the instruction B asked for.

On return of this cause defendant should have leave to amend its answer if it desires to do so and set out this matter, as shown in evidence.

Instruction No. 1, given by the court, contains a full exposition of the law relied upon by plaintiff. We would suggest, however, that instruction No. 2,*intended to embrace the law for defendant, should be redrafted, setting forth clearly, as it should do, that plaintiff can not recover unless the custom, established and proven, covers the state of case under which his tobacco was held by the defendant at the time it was burned.

And again submitting as a part of same or separately to the jury that if side by side with the custom by which warehousemen were required to keep tobacco deposited with them for sale insured, whether there was yet another custom in said trade and between the warehouse proprietors and their customers whereby tobacco held by them after a first sale to brokers or others was not required to be insured by the warehouse proprietors, but was held at the risk of the purchasers. Then submitting both propositions, that claimed by plaintiff and that claimed by defendant, to the jury, within the evidence offered as to the existence of said custom, of course, and then let the jury from the evidence say whether the tobacco held for plaintiff at the time of the fire was held under one or the other of said customs and decide accordingly.

Finnell, &c v. Higginbotham, Tr., &c.

Judgment reversed for further proceedings as herein indicated.

CASE 4—PETITION EQUITY—FEBRUARY 23.

Finnell, &c., v. Higginbotham, Trustee, &c.

APPEAL FROM GARRARD CIRCUIT COURT.

1. DUTY OF PURCHASER TO SEE TO APPLICATION OF PURCHASE MONEY—EQUITABLE LIEN—PREFERRED CLAIMS.—Where a purchaser of land was by a judgment of court made a trustee for the investment of the purchase money for the benefit of others, the beneficiaries had an equitable lien upon the land to secure the investment, and the trustee having failed to make the investment, in the distribution of her estate under the statute against preferences by insolvent debtors the beneficiaries are entitled to have their lien enforced, there being no valid mortgage liens upon the land. But this debt is not a preferred claim under the statute (sec. 7, art. 2, chap. 44, Gen. Stats.), because the trust was not created by deed or will. Nor is it a lien for purchase money. And while it was asserted merely as a preferred claim, the equitable lien may be enforced under the prayer for general relief.
2. HOMESTEAD—PARTIAL TRANSCRIPT.—This court can not revise the judgment of the lower court in so far as it denies to one of the appellants a homestead as against certain mortgages, the pleadings of the mortgagees not being before the court.
3. AN APPEAL FROM A JUDGMENT MERELY CONFIRMING A PREVIOUS JUDGMENT which was final does not authorize this court to review the judgment thus confirmed, there being no appeal therefrom.

R. H. TOMLINSON & W. J. LANDRAM FOR APPELLANTS.

1. The court erred in holding that the claim of appellant, Mattie E. Finnell, was not a preferred claim. (Gen. Stats., chap. 44, art. 2, sec. 7.)
2. Appellant, Ann M. Broadus, was entitled to her personal exemptions.

W. O. BRADLEY FOR APPELLEES.

1. Debts due as trustee have no priority, unless "the trust be created

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by deed or will, duly recorded in the proper clerk's office." (Gen. Stats. chap. 44, art. 2, sec. 7.)

2. Mrs. Broaddus was not entitled to a homestead. The conveyance of the land without restriction passed every interest she had.
3. No claim was made by Mrs. Broaddus in any pleading for exempt personal property. The amended answer offered to be filed can not be considered in the absence of any bill of exceptions or order of court identifying it. (Orth v. Clutz, 18 B. M., 223; Young v. Bennett, 7 Bush, 476; Nolan v. Feltman, 12 Bush, 119.)
4. The judgment denying the exemptions claimed must be affirmed in the absence of the proof heard.

JUDGE PAYNTER DELIVERED THE OPINION OF THE COURT.

Ann M. Broaddus, by a judgment of the Madison Common Pleas Court, was made trustee for the appellant, Mattie E. Finnell and her children, for the investment of \$195, arising out of the sale of certain lands, including a twenty-one-acre tract in Garrard county, Ky. The court, by its commissioner, conveyed her the land, but directed this fund of \$195 should be invested by her in real or personal property for the benefit of the appellant, Mattie E. Finnell, and her children. This twenty-one acres of land was impressed with a trust, and an equitable lien existed on it until the trustee executed the trust by investing the fund in either real or personal property for the benefit of her cestui que trust. The trustee having failed to so invest the fund, the cestui que trust can assert a lien in this action as a superior claim to that of her general creditors, and as there were no valid mortgage liens on the twenty-one acres of land, the appellant and her children are entitled to have it enforced. It is insisted by counsel for appellant that this is a preferred claim, under ch. 44, article 2, sec. 7, General Statutes. This construction is not sustained, because the debt is not created by deed or will. Neither is it a lien for purchase money.

It is an equitable lien, which followed the land into the hands of the trustee.

While appellant, Mrs. Finnell, asserted it as a preferred claim against the trust estate, yet, under the prayer for general relief the equitable lien can be enforced.

The court erred in refusing to enforce this lien for the \$195 with interest from the 7th day of June, 1887, and in holding that the debt should be classed with the general claims against the estate.

Ann M. Broaddus appeals and asks a reversal of the judgment, because she was not allowed a homestead and certain exempt personal property. It appears from the judgment that there were four mortgages on her land, out of which it is claimed the homestead should be assigned: One to J. B. Carter, one to C. C. Stormes, one to Berea College and one to J. B. Sweeney. None of the pleadings filed in this case by either of the mortgagees are copied into the record, and the judgment is that she is not entitled to a homestead against these mortgages. The judgment shows that by consent of the parties oral proof was introduced on the question of her right to a homestead. No bill of exceptions is made part of the record. With the record as it appears before us we can not reverse the judgment.

It is claimed that the court below erred in refusing to have set apart to Ann M. Broaddus certain personal property as exempt.

The judgment of March 31, 1893, from which the appeal is taken, does not determine the question as to her right to the exemption, except it confirms "a previous judgment of the court," which was final.

By the judgment rendered on the 22d of March, 1893, her exempt property was adjudged to be for the benefit of Sweeney, except such as was embraced by prior mortgages.

There is no appeal from the judgment of March 22, 1893, which determined the question as to her right to the exemption in her personal property. However, if there was an appeal from it we could not hold that the court erred, because none of the pleadings relating to the question have been made part of the record, in the absence of which we could not determine as to the propriety of the action of the court in giving the exempt personal property to Sweeney. The pleading of Ann M. Broaddus, which counsel refers to as having been filed on the 16th of March, 1893, in which she claims a homestead and personal property as exempt, does not appear from this record to have been filed. It is simply marked offered, and there is no order filing it. It is not part of the record and can not be considered on this appeal.

The judgment as to Ann M. Broaddus is affirmed, and reversed as to Mattie E. Finnell, with direction for further proceedings consistent with this opinion.

CASE 5—INDICTMENT.—FEBRUARY 26.

Combs v. Commonwealth.

APPEAL FROM POWELL CIRCUIT COURT.

1. **COMPETENCY OF JURORS.**—Although one of the jury may have been incompetent because not at the time twenty-one years of age, that fact, as expressly provided by sec. 2253, Ky. Stats., is not cause for setting the verdict aside; nor could exception have been taken therefor after the jury was sworn.
2. **IMPEACHMENT OF WITNESS.**—Before impeaching by general evidence the credit for veracity of a witness it must be shown by the impeaching witness that he knows the general reputation of the person in question among his neighbors, or what is generally said of him by those among whom he dwells or with whom he is

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chiefly conversant; and the impeaching testimony must relate to his reputation among such persons. It was not competent, therefore, in this case to show the bad reputation of a witness in a county in which he had not resided, and among people whom it did not appear were his neighbors.

3. **LIMITING TIME OF ARGUMENT TO JURY.**—This court will not reverse upon the ground too short time was allowed for argument of counsel to the jury, unless satisfied the trial court has abused its discretion as to that matter.

Counsel were allowed upon the trial of appellant for murder three hours to each side, which, the contrary not appearing, this court must conclude was not so short time as to prejudice the substantial rights of the appellant.

A. T. WOOD FOR APPELLANT.

1. The court should have allowed the witnesses, Wm. Bryan and Wm. Thorp, to prove the reputation of Eubank for truth, they having fully qualified themselves.
2. The court erred to the prejudice of defendant in limiting the argument to three hours.
3. The convicts should not have been allowed to testify. (Civil Code, sec. 606, subsec. 8; Ky. Stats., sec. 1180.)

The court is asked to overrule the cases of Commonwealth v. McGuire, 84 Ky., 57, and Combs v. Commonwealth, 15 Ky. L. R., 660.
4. As one of the jurors was under twenty-one years of age, appellant has not had a fair trial by a jury of his peers, and the verdict is void. (Con. of Ky., sec. 7.)

WM. J. HENDRICK, ATTORNEY-GENERAL, FOR APPELLEE.

1. The cases of Commonwealth v. McGuire, 84 Ky., 57, and Combs v. Commonwealth, 15 Ky. L. R., 660, are good law and should be adhered to.
2. Sec. 2253, Ky. Stats., settles the objection to the juror upon the ground that he was under twenty-one years old.

JUDGE LEWIS DELIVERED THE OPINION OF THE COURT.

Appellant, under an indictment for conspiring with Jim Combs, Jesse Barnett and Charles Wall, to murder John A. Rose, who was actually killed by Combs and Barnett, has been twice convicted and sentenced to confinement in the penitentiary for life, this being the second appeal.

Combs v. Commonwealth.

We need not state in detail facts proven on the last trial, as they were substantially stated in the opinion of this court on the first appeal. See *Combs v. Com.*, 15 Ky. L. R. 660.

Two accomplices, Wall and Barnett, though already convicted of the offense, testified as witnesses for the Commonwealth at the last, as did one of them at the first trial. And as the question of their competency was made and decided on the former appeal it need not be again discussed.

The court below instructed the jury in the manner required by the Criminal Code in respect to necessity for corroboration of testimony of accomplices, and as there was competent evidence conducing to establish appellant's guilt, the verdict can be now disturbed, if at all, only upon ground of some reversible error of law occurring at the trial.

Although one of the jury may have been incompetent because not at the time twenty-one years of age, that fact, as expressly provided by sec. 2253 Ky. Statutes, is not cause for setting the verdict aside, nor could exception have been taken therefor after the jury was sworn. Another error, to which our attention has been called, is the refusal of the court below to permit witnesses to prove, as accused avowed they, if allowed, would do, that they were acquainted with the general reputation for veracity in Breathitt county, of a witness previously introduced by the Commonwealth, and that it was bad. Before impeaching, by general evidence, the credit for veracity of a witness, it must be shown by the impeaching witness that he knows the general reputation of the person in question among his neighbors, or what is generally said of him by those among whom he dwells, or with whom he is chiefly conversant. *Greenleaf on Evidence*, vol. 1, sec. 461. And the policy and justice of that rule is too manifest to

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disregard, even if it had not been uniformly recognized by this court.

Breathitt county was not then nor had been prior to trial of accused residence of the witness whose reputation for veracity was attempted to be impeached, nor did the impeaching witness know or undertake to testify what was his general reputation among his neighbors. Consequently the evidence in question was properly rejected.

What length of time the ends of justice and rights of an accused party require should be allowed for argument to the jury on a criminal trial must from necessity be generally left to the sound discretion of the trial court; otherwise, an undue portion of the time of a court might be needlessly consumed in trial of one cause, to detriment of other business and rights of other parties. Therefore, this court will not reverse upon the ground too short time was allowed, unless satisfied that discretion has been abused. Counsel were allowed in this case three hours to each side, which, the contrary not appearing, we must conclude was not so short time as to prejudice substantial rights of appellant.

Judgment affirmed.

CASE 6—INDICTMENT—FEBRUARY 28.

Commonwealth v. Steele.

APPEAL FROM LINCOLN CIRCUIT COURT.

1. **BRIBERY.**—One who bribes another to vote in a particular way at an election held to take the sense of the voters of a precinct as to the sale of liquor therein is guilty of bribery under sec. 1587 of the Kentucky Statutes.
2. **SAME.**—To constitute the offense of bribery the person receiving the reward, benefit or advantage must be influenced or be intend-

Commonwealth v. Steele.

ed to be influenced thereby not merely to vote at an election, but to vote for a particular candidate or ticket, or upon a particular side of a question submitted, and the indictment must be direct and certain as to that matter. It is, therefore, not sufficient to allege that the defendant bribed a named person to vote at an election by paying him a certain amount and that the person named voted as requested in consideration of the amount paid, as it is only an inference that the person named was bribed to vote on a particular side of the question submitted, or to do anything more than to exercise his right of suffrage.

WM. J. HENDRICK, ATTORNEY-GENERAL, FOR APPELLANT.

R. C. WARREN FOR APPELLEE.

The indictment is bad. It is not alleged that George Carpenter was a legal voter and authorized to vote at an election duly and legally held. And it is not alleged that by reason of any action of appellee he voted differently from the way he had intended to vote. (Commonwealth v. Selby, 87 Ky., 595.)

JUDGE LEWIS DELIVERED THE OPINION OF THE COURT.

Appellee was indicted for bribing another to vote at an election, the particular circumstances of the offense being stated as follows: "That said J. F. Steele * * * did unlawfully and wilfully bribe G. W. Carpenter to vote in an election by paying said Carpenter one dollar, which he received and voted as requested by said Steele, in consideration of said one dollar." It is further stated that the election was held, at a time and place mentioned, for taking sense of the legally qualified voters of a precinct named upon the proposition whether spirituous, vinous or malt liquors should be sold therein; and that said G. W. Carpenter at the time was a legal voter in that precinct.

Sec. 1586, being part of chap. 41, title "Elections," Ky. Stat., provides that "any person guilty of receiving a bribe for his vote at an election, or for services or influence in procuring a vote or votes at an election, shall be fined from

fifty to five hundred dollars and be excluded from office and suffrage."

Sec. 1587 is as follows: "Whoever shall bribe another shall, on conviction, be fined from fifty to one hundred dollars, or imprisoned from ten to ninety days, or both so fined and imprisoned, and be excluded from office and suffrage."

According to sub-sec. 1, sec. 1586, "bribe" or "bribery" means "any reward, benefit or advantage present or future to the party influenced or intended to be influenced, or to another at his instance, or the promise of such reward, benefit or advantage." And sec. 1437, same chapter, provides that the word "election," wherever used therein in reference to a State, district, county or municipal election, "shall be deemed to include the decision of questions submitted to the qualified voters as well as the choice of officers by them."

In our opinion the election referred to is within purview of that chapter, and there is stated in the indictment the essential facts that election was legally held and said Carpenter was then a qualified voter and entitled to vote at it.

But it seems to us the acts as stated in the indictment do not constitute a complete offense under the statute. For the mere statement that accused did bribe G. W. Carpenter to vote in an election by paying one dollar, fairly and properly means no more than that he was bribed to do what he had the legal and moral right and it was his duty as a citizen to do. Nor do the concluding words of the sentence: "and voted as requested by said Steele in consideration of said dollar," convey an additional or other idea than he was influenced by the considerations paid to simply exercise his right of suffrage. Manifestly to constitute the offense of bribing another, in meaning of the statute, the fact must be stated in the indictment that the party receiving the re-

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ward, benefit or advantage was influenced or intended to be influenced thereby not merely to vote at an election, but to vote for a particular candidate or ticket of candidates for officers named, or upon a particular side of a named question submitted to qualified voters.

It perhaps might be reasonably inferred from what is stated in the indictment that G. W. Carpenter was influenced by the money paid and received to vote on one side or other of the proposition submitted, though whether in the affirmative or negative is not stated; but the particular circumstances of an offense charged can not be left for inference; for an indictment is required by Criminal Code to be in that respect direct and certain.

Wherefore, the judgment sustaining demurrer to the indictment is affirmed.

CASE 7—PETITION EQUITY—MARCH 1.

Martin, &c., v. City of Louisville,
Reed, &c., v. Same.

APPEAL FROM LOUISVILLE CHANCERY COURT.

1. CLOSING OF STREETS AND ALLEYS.—Without some legislative authority a city has no power either to condemn or close streets or alleys; and where a mode is pointed out in the charter for closing streets and alleys that mode must be regarded as exclusive.

Under the charter of the city of Louisville, which authorized the court, in an action instituted by the city for that purpose, to decree the closing of a street or alley, "if satisfied that the closing up would be beneficial to said city and not injurious to any party not consenting," the court had no power to order the closing of an alley where it appeared that damage would result to property owners not consenting to the closing, even though compensation was made.

2. SAME.—A corporation, whether municipal or private, seeking to appropriate a street or alley to its use must resort to the writ

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of *ad quod damnum*, and under it compensate the owner for the injury sustained. But the city can not even in that way close a street or alley unless it be for the purpose of appropriating it to some municipal or public use.

W. W. THUM, WILLSON & THUM, J. C. POSTON AND N. T. CRUTCHFIELD FOR APPELLANTS.

Brief not in record.

HENRY S. BARKER FOR APPELLEE.

The city has a right to close and discontinue highways subject only to the demand of any abutting property holder to be compensated for the damage which his property may sustain by reason thereof. (Gargan v. Louisville, &c., R. Co., 89 Ky., 212; Elliott's Digest of City Laws and Ordinances, p. 150; Opinion of Judge Pryor on motion to re-instate injunction in Mengel & Bro. Co. v. City of Louisville.)

CHIEF JUSTICE PRYOR DELIVERED THE OPINION OF THE COURT.

This proceeding was instituted in the Louisville Chancery Court by the city of Louisville as the plaintiff, against the owners of certain lots, Martin and others, for the purpose of discontinuing an alley running from Fourth street west to a point where it intersects another alley in the center of the square.

The provision of the charter under which the action was brought is as follows: "That the city may at any time institute suit in the Louisville Chancery Court for the purpose of closing up any of its streets or alleys, dividing any of the squares or lots thereon, and to such suit all the owners of ground in the square or lot shall be made defendants, and if all such defendants are competent to act for themselves, and shall consent to the closing up prayed for, then the court shall render a decree accordingly, but without such consent said court shall hear the proof made by the parties, and if satisfied that the closing up would be beneficial to

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said city, and not injurious to any party not consenting, shall render a decree closing up said street or alley."

A resolution was passed by both boards of the council and signed by the mayor authorizing the attorney for the city to bring the action, a large majority of those owning real estate within the square having presented a petition to the council asking that this alley be closed.

The alley was directed to be closed and three of the owners of lots or parts of lots are appealing from the order of the chancellor.

These appellants claim their respective lots were lessened in value by reason of the closing of this alley, and that much inconvenience would result to them in passing from their homes to Fourth street, causing them to travel a much greater distance than the usual passway through this alley.

It appearing from all the testimony that some damage would result to these property owners, the chancellor in order to assess the damages to the lot of Mrs. Martin and that of Buffemeyer had a jury impanelled who awarded to Mrs. Martin \$125, and to the heirs of Buffemeyer a like sum, or rather they accepted a sum equal to that given Martin. The proceeding to award damages and all steps taken for that purpose were objected and excepted to by the appellants upon the ground that no proceedings could be had in the nature of a writ of *ad quod damnum*, when the closing of the alley depended only upon its being beneficial to the city, and not injurious to the lot owners, and besides that no such ordinance had been passed as authorized the assessment of damages in the event the city was attempting to take from the property owner her right of property in this easement that it might be devoted to a municipal or public use. The only provision of the city charter to which our attention has been called in reference to the condemnation of

property for city purposes provides: "Whenever, in the opinion of the general council, property shall be needed for municipal purposes, either within the boundary of said city, or the county of Jefferson, said council may by ordinance order the condemnation of such property." It is not pretended that this is a condemnation proceeding, or that the closing of the alley is such a municipal user as could deprive the owner of his right of property in the easement by condemnatory proceedings. If the city desired to appropriate this alley to some municipal or public use, then the right of property in it could be condemned, but not otherwise. The charter contains the organic law of the city, and when property is to be condemned for public use the way is pointed out by an express provision, and when the existence of a street or alley is no longer beneficial to the city, although not needed for municipal use, it may be closed up, when not injuring the property owners on the square whose right of property in the easement is undoubted; and this proceeding is also authorized by a special clause of the charter.

Without some legislative authority a city has no power either to condemn or close streets or alleys, and the city of Louisville deriving its sole power from its charter provisions, the mode pointed out for closing streets and alleys must be regarded as exclusive.

In the case of Gargan vs. The Louisville, &c. R. Co., reported in 89 Ky., 212, this court, in discussing the rights of the city to close streets, said a corporation, whether municipal or private, seeking to appropriate the street to its own use, must resort to the writ of *ad quod damnum*, and under it compensate the owner for the injury sustained.

As to two of the appellants, Reed and Hermany, it appears that before the case stood for trial, although judgment by default had been entered against them, they gave reasons

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for asserting their claim to damages, and denying the right of the city to close the alley. They ought to have been permitted to make defense. It is not necessary, however, to consider these questions, as the judgment must be reversed, and if the alley is open to use, it is for all those on the square.

Judgment reversed, with directions to dismiss the petition.

CASE 8—PETITION ORDINARY TRANSFERRED TO EQUITY—
MARCH 5.

German National Bank v. Butchers' Hide and
Tallow Co.

APPEAL FROM JEFFERSON CIRCUIT COURT, CHANCERY DIVISION.

1. CORPORATIONS—ULTRA VIRES.—A corporation must account for benefits which it has received under an *ultra vires* transaction. Therefore, where it has used the proceeds of a note in its business it can not escape liability on the note upon the ground that its president had no power to discount the paper.
2. MISTAKES IN THE EXECUTION OF NEGOTIABLE PAPER may always be corrected unless the rights of third parties have intervened.

Where a negotiable note, payable at, and discounted by, the German National Bank, was repeatedly renewed, the several renewals being made payable in the same way until the last renewal here sued on, which was made payable at "said bank," the word "said" being by mistake substituted for the words, "German National," as it is manifest that in the contemplation of all the parties the words "said bank" meant the plaintiff, the German National Bank, they will be so read by the court. But if they could not be so read, the mistake, being pleaded and proved, would be corrected, the rights of no third person being involved, the defendants, who were indorsers, having received the proceeds of the note.

97	34
108	34
108	35
108	36

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O'NEAL & PRYOR AND W. O. HARRIS FOR APPELLANT.

Brief not in record.

T. L. BURNETT, FRANK HAGAN & SON AND LANE & BURNETT
FOR APPELLEE.

1. As the Statute of Anne has never been in force in Kentucky, a promissory note to be placed in the State of Kentucky on the footing of a foreign bill of exchange must, in writing, set out an unconditional promise of the maker to pay to the order of the designated payee a sum of money certain at a fixed time at some one of the banks incorporated under the laws of Kentucky, or at some bank organized in Kentucky under a law of the United States, be signed by the maker and before its maturity must be by the payee or his indorsee indorsed to and discounted by one of the above named banks. (Sec. 21, chap. 22, of the Gen. Stats.) Until a note is fully expressed in its essentials in writing it is not the subject of discount, assignment, indorsement or transfer. (Renfro v. Merchants, 83 Ala., 425; Hadens v. Lehman, 83 Ala., 243; Grossman v. May, 68 Md., 244; Tevis v. Young, 1 Met., 197; Scales v. Ashbrook, 1 Met., 361; Hurt v. Harrison, 91 Mo., 418; Cook v. Mutual, 53 Ala., 38; Barclay v. Enochs, 61 Mo., 218; Davis v. Sewing Machine Co., 105 N. Y., 59; Payne v. The Bank, &c., 10 Bush, 177; Gwathmey v. Cliskey, 31 Fed. Rep., 220; Ward v. Grayson, 4 Ky. L. R., 535; Campbell v. Farmers, 10 Bush, 152; Williams v. Obst, 12 Bush, 268.)
2. Mistakes and omissions in the draft of written agreements will not be rectified or corrected, or the written evidence be reformed by the courts, at the instance of those whose negligence occasioned the mischief complained of, and in no instance unless there be clear, direct and positive evidence of the terms of the antecedent agreement, and that by mistake in the subsequent draft of the written evidence and in consequence of the *mutual mistake* of the parties to the agreement some one or more of the terms of the agreement were omitted from the written draft, and in what respects the written draft does not fully express the terms of the antecedent agreement of the parties. (Woolfolk v. The Bank, 10 Bush, 516; Prather v. Weissinger, 10 Bush, 118; McKensie v. Coulston, 8 L. R. Eq. Cases, 375; Shelburn v. Inchiquin, 1 Bro. C. C. 388; Gillespie v. Moore, 2 Johnson Chancery, 585; Fry on Specific Performance, 762; 5 R. I., 479; 6 R. I., 198; 15 Wall., 171; 100 Mass., 382; 17 Johnson, 372; 18 Ill., 492; Fry, 407, 409, 417, 421, 436.)
3. There can be no reformation by the court of the written evidence

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of a contract, unless the parties to the contract who would be affected by the reformation are parties to the action, and are before the court, and one of such parties seeking the reformation. (Pomeroy on Rights and Remedies, sec. 371; *Flanders v. McClanahan*, 24 Iowa, 426; *Pierce v. Fanner*, 47 Me., 507; *Newman v. Home, &c.*, 20 Me., 422; *Denham v. Bishoff*, 47 Ind., 211; *Bush v. Hicks*, 60 N. Y., 298; *Mills v. Buttrick*, 4 Col., 123; *Haley v. Bagley*, 37 Mo., 363.)

4. A bill of exchange is a courier without luggage or baggage, and its face, which must be fully expressed in writing, is its sole and only passport. (Daniels on Negotiable Instruments, sec. 79; 24 Wis., 21; *Parsons on Contracts*, vol. 3, page 398; 38 Fed. Rep., 298.) The failure to express in writing and on the face of a bill of exchange or a note any one of its essentials dishonors it at once. (1 Met., 197.)
5. A corporation can only be bound by the acts of its officers and agents within the scope of their authority. (Angell on Corporations, 236, 304; *Angell & Ames on Corporations*, 8 Taylor, 236; *Morawetz on Corporations*, secs. 537, 581, 591; 37 N. J. L., 98; 1 B. M., 14; 7 J. J. M., 85; 114 N. Y., 487; 85 Tenn., 703; 22 Wis., 198; 7 Daly, 326; *Kenton v. Bowman*, 85 Ky., 430; *Chemical v. Wagner*, 14 Ky. L. R. 510; 1 Met. (Ky.), 550, 552; 3 J. J. Mar., 205; 56 Hun, 412; 82 Va., 913; 19 N. Y., 207; 37 N. J. L., 98; 5 Denio, 567.)
6. Officers of a corporation can not waive any of the rights of the corporation without authority so to do from the managing body, or act for the corporation in a matter when, at the same time, they have, or are representing for others, interests hostile to those of the corporation. (Taylor, 636, 642, 628, 612; 18 Ohio, 169; 50 Iowa, 376; 22 Penn. St., 320; 36 Mich., 263; 41 Mich., 169.)
7. The failure of the holder of a bill of exchange without legal excuse therefor to make presentment of and demand payment of the same on the day of its maturity operates as a full, absolute and unconditional discharge and release to the drawer or indorser thereof of any further liability thereon, and a subsequent promise, oral or written, by the drawer or indorser to pay the bill to the holder is void for want of consideration, unless the holder makes it affirmatively appear that at the time of such subsequent promise, oral or written, by the drawer or indorser to pay to the holder the bill, the drawer or indorser knew that the holder had failed on the day of its maturity to make presentment of and demand for the payment of the bill, and that in consequence thereof such indorser or drawer had ceased in law or equity to be further bound or liable thereon. (Daniel on Negotiable Instruments, 598, 1149; *Thornton v. Wynn*, 12 Wheaton, 189; *Ralston v. Bullitts*, 3 Bibb, 203; *Ray v. Bank*, 3. B. M., 510; *Spinlock v. Union, &c.*, 4 Humphreys, 336; *Ford v. Dallam*, 3 Coldwell

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This was signed thus: "Kentucky Oak Tanning Company,

"By its President, Gottlieb Layer.

Endorsed: "Louisville Butchers' Hide and Tallow Co.

"By Adam C. Layer, President."

The name of the appellee would be filled in as the payee, and when the proper dates and amounts were inserted and the signatures of the parties attached, the note would be delivered to the bank.

When two of the notes matured on April 8, 1890, the usual form was not at hand, and the bank official furnished to the payor a form of this kind:

**"§ Louisville, Ky.....189..
.....days after date we
jointly and severally promise to pay to the order of the Ger-
man National Bank, of Louisville, Ky.....dollars,
value received, negotiable and payable at the office of said
bank at Louisville, Ky., with interest after maturity at the
rate of six per cent. per annum until paid."**

Upon getting this form, the book-keeper and general manager of the tanning company, with an old form before him, sought to make the new conform to the old form, and therefore ran his pen through the words "German National Bank," as well as through some other words not found in the old. The note then read as follows, it being one of those sued on in this action, the other one differing only as to its amount:

“9,464.21

Louisville, Ky., April 8, 1890.

Four months after date we promise to pay to the order of the Louisville Butchers' Hide and Tallow Company nine thousand four hundred and sixty-four dollars and twenty-one cents, value received, negotiable and payable at the office of said bank, at Louisville, Ky., with interest after

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maturity at the rate of 6 per cent. per annum until paid."

Signed: "Kentucky Oak and Tanning Company.

"By Gottlieb Layer, President."

Endorsed: "Louisville Butchers' Hide and Tallow Co.

"By its President, Adam C. Layer."

The other two notes were renewed on the old forms.

When they were due the last time, each of the four was duly protested for non-payment, and thereafter this action on them was brought in the Jefferson Court of Common Pleas, but was finally heard by the chancellor in the Louisville Chancery Court. The petition was amended and reformation asked as to the two notes where the erasures occurred, and it was alleged that the words "German National" were left out by mistake and the words "said bank" meant in fact, in the contemplation of all the parties, the German National Bank. This was denied by the appellee, and it was contended that the notes were not negotiable and payable at any bank, and that the only liability imposed on the appellee was that of assignor, and this had been discharged by the negligence of the bank in failing to prosecute the maker of the notes to insolvency.

It was also contended that the act of the appellee's president in discounting and renewing the four notes was *ultra vires*; that as to two of the notes, there was no mistake, or if there was, it could not be corrected.

After an elaborate preparation of the case the chancellor held that the contention on the part of the defendant that its president had no right under its articles of incorporation and by-laws to discount paper could not be sustained; that it had received the proceeds of the discounts and had continued to hold them, and in many other ways had approved the action of its president in making the discounts in ques-

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tion. As to two of the notes, therefore, judgment was rendered for the plaintiff. It was held, however, that the evidence as to the mistake in the execution of the other notes was insufficient to authorize the court to reform them, and as to them the court dismissed the petition.

It is to be observed at the outset that this contest is between the original parties to the notes. The rights of no innocent holder are involved, or of any indorser for mere accommodation. The appellee sold to the appellant and received and used the proceeds of the notes in its business. It continues to do so, and we hardly need cite authority in support of the chancellor's conclusion that the transaction was not void for want of authority on the part of the appellee's president to discount the paper.

The corporation can not hold on to the money and repudiate the acts by which it got it.

"In every case a corporation must account for benefits which it has received under an *ultra vires* transaction. This is a well-known equitable doctrine. It has been applied not only to persons of full age and under no disability, civil or mental, but also to those who are under some incapacity—infants and lunatics. From these persons the principle has been extended to corporations." (Brice on *Ultra Vires*, 2 Eng. Ed., 769.)

"A corporation can not be charged with the loan of money made by its directors without authority, but if any portion of the money was applied for the benefit of the company, it may be held liable to that extent at least." (Morawetz, sec. 123.)

See also to same effect *Springfield &c. T. P. R. Co. v. Trustees of Harrodsburg*, 11 Ky. L. R., 309; *Sherman Center Town Co. v. Russell*, 26 Pac. Rep., 715; *Congress &c. Spring Co. v. Knowlton*, 103 U. S., 57.

As to the question of the place of payment, it seems to us hardly necessary to have made the attempt to correct the oversight of the draftsman in leaving out the words "German National." It is perfectly manifest that in the contemplation of all the parties to the transaction, the words "said bank" meant the appellant. Three times each year for from eight to ten years the appellee had regularly endorsed the forms furnished by this bank, where it had originally gotten the money, and we do not doubt it was as much surprised as the appellant in discovering the absence of the usual words. Under the circumstances, the language "said bank," as used, meant the German National Bank. But if we could not so read the paper, the evidence is absolutely conclusive as to its real meaning. The officers of the bank, those of the tanning company, as well as those of the appellee, unite in saying that in signing the notes sued on in renewal of former ones, the intention was to sign duplicates of the old notes, which were all payable at the German National Bank.

The president of the appellee says that when he signed the notes sued on he intended signing such duplicates, and that what he did in fact sign *meant the German National Bank*; that there was no other meant. The learned chancellor was of opinion that there was no direct proof of an antecedent contract between the parties, that the particular notes sued on were to be made payable at this bank, and it may be admitted that none of the witnesses say in express terms that there was such an antecedent agreement or contract to that effect. What is absolutely clear, however, is that the evident understanding of each party to the transaction was that the renewals were to be made payable as the old notes had been for years. The common intention of the parties, as shown by the entire absence of any contrariety

in their testimony on this point, is evidence of their mutual understanding and agreement. It was because of this arrangement and agreement, so well understood, that the intent was common and mutual to all to sign notes payable at the bank where they were doing this particular business. If such were the purpose of the parties to the bills, why may not the agreement be carried out by the insertion of the omitted words? In *Scales v. Ashbrook*, 1 Met., 358, it was held that "relief should be granted whenever an instrument"—in that case a bill of exchange—"which is intended to carry into execution an agreement previously made, by mistake of the draftsman, either as to law or fact, does not fulfill that intention, or violate it. In such case equity will correct the mistake * * and will compel the party refusing to comply with the agreement according to its terms." Citing *Inskoe v. Proctor*, 6 Mon., 311; *Hunt v. Rousmaniere*, 1 Peters, 13; *Story's Eq.*, sec 115. To the same effect see *Parcels v. Gohegan*, 2 J. J. Mar., 133; *McCurdy v. Breathitt*, 5 Mon., 234. In *Cothran v. Cunningham*, 28 Ga., 178, it was held that parol evidence was admissible to show that it was agreed to make a note payable in bank, and the fact that a former note of which the note sued on was a renewal was so payable was a cogent circumstance, going to show such an agreement. (See also *Farr v. Ricker*, 46 O. St., 265; *Watkins v. Maule*, 2 Jacob & Walker, 237.)

Mr. Daniel, in his work on Negotiable Instruments, lays down the rule that mistakes in the execution of such paper may always be corrected, unless the rights of third persons have intervened. (Secs. 850-53.)

The learned chancellor very aptly said that courts of equity never rectify contracts, but that they do rectify the instruments evidencing the contracts. We can not agree with him, however, in holding that the agreement

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in this case was not shown by sufficient proof, or that no mistake was shown in the execution of the notes. If the manifest intention or agreement of all the parties to the bills is to be effectuated the instruments must be read as if they contained the words "German National" between the words "said bank." It is impossible to doubt this under the proof.

Affirmed on cross-appeal and reversed on the original appeal, with directions to enter judgment on each of the notes sued on.

CASE 9—PETITION EQUITY—MARCH 5.

Perkins, &c v. McCarley, &c.

APPEAL FROM GARRARD CIRCUIT COURT.

1. **VENUE OF ACTION.**—An action under subsec. 2 of sec. 490, Civil Code, for the sale of land owned jointly by plaintiffs and defendants as devisees under a will, and for a distribution of the proceeds, upon the ground that the property could not be divided without materially impairing its value, was properly brought in the county in which the land was situated, although that was not the county in which the personal representative of the testator was qualified. The venue of such action is fixed by subsec. 3 of sec. 62, and not by sec. 66 of the Civil Code.
2. **PROOF OF ALLEGATIONS AGAINST DEFENDANTS CONSTRUCTIVELY SERVED.**—As the defendants were before the court only by constructive service, the court should have required proof of the allegation that the land could not be partitioned without materially impairing its value. But as the court had jurisdiction and the land has been sold, the purchaser can not now be disturbed.
3. **AFFIDAVIT FOR WARNING ORDER.**—It is sufficient to state in an affidavit for a warning order the postoffice address of the non-resident defendant without following literally the requirement of the Code that the affidavit shall state "the name of the place wherein a postoffice is kept nearest to the place where the defendant resides or may be found."

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W. O. BRADLEY FOR APPELLANT.

1. The charge that the land was indivisible could not be taken as true against non-residents in the absence of evidence. (McFarland v. Garnett, 10 Ky. Law Rep., 91; Sears v. Henry, 13 Bush, 416; Civil Code, sec. 409; *Idem*, sec. 606, subsec. 3; *Idem*, sec. 574.) Friddle v. Kohn, 14 Ky. L. R., 312, distinguished.
2. An action for the sale of land belonging to the estate of a decedent and distribution of proceeds must be brought in the county where the will is probated. (Civil Code, sec. 66; Flint v. Spurr, 17 B. Mon. 513; Driskill v. Hanks, 18 B. Mon. 365; Walker v. Yowells, 14 Ky. Law Rep., 827;
3. The affidavits for warning orders were not sufficient. (Civil Code, sec. 58, subsecs. 2, 5; *Idem*, sec. 57, subdiv. 2; Arthurs v. Harlan, 78 Ky. 138.)

In all proceedings upon constructive service the provisions of the Code regulating the same must be literally followed. (Brownfield, &c. v. Dyer, 7 Bush, 506; Grigsby v. Barr, 14 Bush, 330.)

ROBERT HARDING FOR APPELLEES.

1. The Garrard Circuit Court had jurisdiction to decree the sale. These were not actions for the settlement of a decedent's estate, but for the sale of indivisible real estate. (Civil Code, sec. 62, subsec. 4; *Idem*, sec. 490, subsec. 2.)
2. Both petitions allege the indivisibility of the land and are verified. But if the indivisibility of the land did not appear it could not affect the title of appellees. (Friddle, &c. v. Kohn, 14 Ky. L. R., 312.)
3. It sufficiently appears that all the parties were before the court.

JUDGE PAYNTER DELIVERED THE OPINION OF THE COURT.

John Perkins, domiciled in Lincoln county, Ky., died testate, bequeathing to certain of his children a tract of land in Garrard county Ky., containing about one hundred and fifty acres. An action was instituted in the Garrard Circuit Court by part against the other devisees to sell the land and distribute the proceeds of the sale among the devisees for the reason, as alleged, that it would materially impair the value of the land to partition it among them.

The action is under sub-sec. 2, sec. 490, Civil Code.

The court ordered a sale of the property, and at the sale the appellee, J. McCarley, became the purchaser but transferred a half interest to Lawson. The defendants were all non-residents and were before the court by warning order.

After the sale and the payment of the purchase money to the commissioners of the court by the purchasers, and deed made, the appellant gave notice and entered a motion to have the judgment and various orders made in the action set aside.

The court overruled the motion and from that action of the court this appeal is prosecuted.

It is contended that as John Perkins' personal representative qualified in Lincoln county, the Garrard Circuit Court had no jurisdiction to order a sale of the land. If the Garrard Circuit Court was without jurisdiction then the order would be void and the purchasers would have acquired no rights under their purchase.

Certain sections of the Civil Code read as follows:

Sec. 62. "Actions must be brought in the county in which the subject of the action or some part thereof is situated.

* * * * *

2. For the partition of real property except as is provided in sec. 66.

3. For the sale of real property under title 10, chapter 14, or under a mortgage, lien, or other encumbrance or charge, except for debts of a decedent."

Sec. 65. "An action to settle the estate of a deceased person must be brought in the county in which his personal representative was qualified."

Sec. 66. "An action for the distribution of the estate of a deceased person or for its partition among his heirs, or

for the sale, for payment of his debts, of property descended from or devised by him, must be brought in the county in which his personal representative was qualified."

This is not an action to settle a decedent's estate. It is alleged that the estate had been settled and all the real estate other than the tract of land sought to be sold had been disposed of by the devisees.

It is not an action to distribute the estate of the decedent. The clause in sec. 66 *supra*, relating to the distribution of the estate, has reference not to real but personal estate.

It is not an action to have property sold to pay the debts of the estate as contemplated by sec. 66, because it is alleged there are no debts against the estate.

The clause in the section providing for a partition of the estate has reference particularly to the realty belonging to the estate.

This is not an action seeking to have the realty partitioned as contemplated by the section, because it is alleged that it will materially impair its value to have it partitioned, hence they seek a sale of it.

The parties to the action were the owners of the land by virtue of the will of their ancestor. An action to sell the land and distribute the proceeds is not the equivalent of, or of the same nature as, an action to partition the land.

In the one case it is to convert the realty into personalty; in the other it is to retain it, but assign it in severalty to the owners.

The action being under sub-sec. 2, sec. 490, title 10, ch. 14, Civil Code, the venue is fixed by sub-sec. 3, sec. 62, Civil Code.

It was properly brought in the Garrard Circuit Court.

It is insisted that the court erred in not requiring the plaintiffs to prove the material allegations in the petition,

as the defendants were before the court on constructive service.

It was alleged that the land could not be partitioned without materially impairing its value, and we think the court should have required proof showing this to be true. But as the court, having jurisdiction in the matter, ordered the land sold, and it has been sold, the purchaser can not now be disturbed.

In the case of *Friddle v. Kohn*, 14 Ky. Law Rep., 312, in passing upon the question of the absence of evidence or the sufficiency thereof, and as to the rights of the purchaser of the land, this court said: "Conceding that the proof is wanting or not sufficient the title nevertheless passes to the purchaser."

The petition was verified substantially as required by the Civil Code, and the statements therein are that the defendants are non-residents of the State of Kentucky and absent therefrom. Their names and several postoffice addresses are given. It is claimed that to give the postoffice address of each defendant was not sufficient, but that there should have been a literal compliance with sub-section 2 of sec. 58, Civil Code, which reads as follows: "Nor shall the clerk make such order on any of the grounds mentioned in sub-sections 1, 2, and 4 of sec. 57, unless the affidavit also state in what country the defendant, * * resides or may be found, and the name of the place wherein a postoffice is kept nearest to the place where the defendant * * resides or may be found."

We are of the opinion that there was a substantial compliance with the Code. The evident purpose of the provision of the Code which required the statements as to where the defendant resides or may be found, and the name of the place wherein a postoffice is kept nearest to the place where he re-

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sides or may be found, was that such information should be given that the attorney appointed to defend for him might be enabled to give him notice through the mail of the pendency of the suit, etc.

To give the defendant's postoffice address is to give more definite information as to how he can be reached by letter than to simply give the name of the place wherein a post-office is kept nearest to the place where the defendant resides or may be found. If the defendant receive his mail at a given place it necessarily follows that is the place where he resides or may be found.

Judgment affirmed.

CASE 10—PETITION ORDINARY—MARCH 7.

Fugate v. City of Somerset.

APPEAL FROM PULASKI CIRCUIT COURT.

1. IT IS THE DUTY OF A CITY TO KEEP ITS STREETS REASONABLY SAFE FOR PUBLIC TRAVEL; and it is liable for injuries resulting from obstructions in the street of which it has had notice, or of which it may reasonably be presumed to have had notice from the length of time the obstruction has existed. And while a city may temporarily place obstructions on a street for the purpose of making repairs, yet this is permitted only as a matter of necessity and for only a reasonable time.

In this action against a city to recover for injuries to plaintiff resulting from his horse, which had become unmanageable, running against a pile of lumber which had been left in the street, and turning his buggy over and throwing him out over an embankment, the court erred in giving a peremptory instruction for defendant, the testimony tending to show that the lumber had been placed in the street by direction of a member of the city council, and that another of the councilmen knew of the obstruction, and that the repairs for the purpose of which the lumber was placed in the street had been completed some time before the injury. Whether the street was so obstructed as to render

97	48
119	232
97	48
132	664
97	48
d138	150

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It dangerous, whether plaintiff was injured by reason of the obstruction, and whether plaintiff was himself guilty of contributory negligence, were all questions for the jury.

2. **SAME.**—Whether the city was under obligation to erect a fence or other barrier along the embankment depends upon whether or not the street was reasonably safe for travel without this fence, and this is a question for the jury.

W. O. BRADLEY AND J. W. COLYAR FOR APPELLANT.

1. Denials in the conjunctive are not good. (*Cincinnati, &c., R. Co. v. Barker*, 14 Ky. Law Rep., 750.)
2. A peremptory instruction should not be given in any case unless it appears that admitting the testimony to be true and every inference fairly deducible from it the plaintiff has failed to support his claim. (*Bell v. Rowland*, Hardin, 301; *Gallatin v. Bradford*, 1 Bibb, 209; *Dodge v. Bank of Ky.*, 2 Mar., 612; *Jackson v. Holliday*, 3 Mon., 366; *Curle v. Beers*, 3 J. J. Mar., 173; *Munsel v. Bartlett*, 6 J. J. Mar., 22; *Gregory v. Nesbitt*, 5 Dana, 421; *Shay v. R. & L. T. Co.*, 1 Bush, 109.)
3. Although the horse was frightened by a locomotive the obstruction was the proximate cause of the injury. (*Elliott on Roads and Streets*, p. 451; *Dillon on Mun. Corp.*, sec. 1007.)
4. It was defendant's duty to keep the streets in safe condition for travelers. (*Dillon on Mun. Corp.*, sec. 1017.)
5. The obstruction was placed in the street by defendant's own officers and two of the council knew of it, hence, defendant had notice and is responsible. (*Dillon on Mun. Corp.*, sec. 1024.)
If defendant had the means of knowing of the obstruction it is chargeable with notice. (*Dillon on Mun. Corp.*, sec. 1025; *Elliott on Roads and Streets*, pp. 461, 462.)
6. It was the duty of defendant to provide a fence or some sort of barrier as protection against the embankment. (*Dillon on Mun. Corp.*, sec. 1005; *Elliott on Roads and Streets*, p. 453.)
7. Any unauthorized obstruction which unnecessarily incommodes the lawful use of a highway is a nuisance. (*Elliott on Roads and Streets*, p. 477.)

While a street may be temporarily obstructed when necessary for repair or improvement, this obstruction must be only for a reasonable time. (*Dillon on Mun. Corp.*, sec. 730.)

In this case two months was an unreasonable time.

O. H. WADDLE FOR APPELLEE.

1. The question raised as to the answer does not come within the principle enunciated in *Cincinnati, &c., R. Co. v. Barker*, 14 Ky. Vol. 97.—4.

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Law Rep., 750, nor does it come within the purview of sec. 126 of the Civil Code.

2. At common law a municipal corporation is not liable to an individual for neglect to keep a highway in repair, whereby he suffers an injury in using it. (Cooley on Torts, 62.)
3. A municipal corporation is not an insurer against accidents upon its streets, nor is every defect therein, though it may cause the injury sued for, actionable. It is sufficient if the streets are in a reasonably safe condition for travel in the ordinary way by night as well as by day; and whether they are so or not is a practical question to be determined in each case by its peculiar circumstances. (Dillon on Mun. Corp., p. 917, 918.)
4. Obstructions consequent on repair of streets create no liability if there is no negligence. (Cooley on Torts, 622; Robbins v. Chicago, 4 Wall, 657; Southworth v. Stamping Ground Turnpike Co., 91 Ky., 485.)
5. A town is not liable for an injury suffered by unmanageable and unruly horses where the road is in such condition that horses under control could have been driven with safety. (Cooley on Torts, 633 (note); Jackson v. Benhover, 30 Wis., 250.)

W. A. MORROW OF COUNSEL ON SAME SIDE.

JUDGE GRACE DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Pulaski Circuit Court, dismissing plaintiff's petition for damages claimed against the city of Somerset.

Plaintiff alleged in his petition that prior to August, 1889, the defendant, by its agents and officers, placed, or suffered and permitted others to place, large piles of lumber on one of its principal streets, whereby same was made and left in an unsafe and dangerous condition for public travel, and so suffered and permitted same to remain for a considerable length of time, and that while in this condition plaintiff, on the third Sunday in August, was driving along said street in said town and his horse became alarmed and unmanageable and ran away, and ran onto and over said obstruction, throwing this plaintiff out of his buggy, and over and down

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an embankment, where said lumber was piled up, and greatly injured this plaintiff in his back and hip, and that all this was without fault or negligence on his part; that his horse and buggy were both injured at the same time and from the same cause.

Plaintiff further charges that this same street was unsafe by reason of the failure and negligence of the city in not providing and having erected a fence, or other barrier or protection, along on the side and at the top of the embankment, for the safety and protection of the public in traveling over same.

Defendants, by their answer, deny substantially each allegation of plaintiff, and say that plaintiff's injuries were caused by and resulted from his own carelessness and negligence in not providing his harness, and using, a safe line, but that the line used was old and rotten, and insufficient to guide or restrain his horse, whereby he was injured.

A jury being impaneled, plaintiff introduced himself and other witnesses, proving substantially the allegations of his petition; that on and along this street where he was driving there was an embankment some fifty or more yards long, and some ten or twelve feet high; that this was unprotected in any way, and that on and along this street and in some several piles of lumber had been placed, some two and a half feet high, five feet wide, the plank being some twelve feet long, same being placed endways to the street and covering several feet of the improved part of said street, and extending up on the metaled part of same, and that his horse, from some reason becoming unmanageable, ran away and over this pile of lumber, turning his buggy over and throwing him out, down and over the embankment, and seriously injuring him in his back and hip, and that after a period of three years he was still at the time of trial in a crippled con-

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dition, and unable to labor for a support. He also proved that his lines were good and strong, of leather, but that in pulling them to keep his horse off this lumber pile one of them did break, but without his fault. He showed that this lumber had been piled up on this street by the direction of one of the councilmen of the city, and that another one lived near by and knew of this obstruction; that this lumber was first removed to that side of the street early in July to make some repairs on the sidewalk on the opposite side of the street, but that these repairs had been completed some time before his injury, though the obstruction still remained. On this testimony in substance plaintiff rested his case, whereupon the court, on motion of the defendant, instructed the jury as in case of a non-suit over the objection of plaintiff. Exception was duly taken, and after the motion for a new trial was overruled this appeal was taken.

The duty of the city to put and keep its streets in good condition and repair, and to keep them reasonably safe for public travel, seems to be admitted. It is equally clear that they must keep same clear of obstructions that are dangerous to public travel, where they have notice of same, or where the same has been obstructed so long that they may be reasonably presumed to have notice.

In this case one of the city councilmen authorized the obstruction to be placed on the street. Another lived near by and must have known of it.

While it is also true that a city may temporarily place obstructions on a street for the purpose of making repairs, yet same is only permitted as a matter of necessity, and for only a reasonable time, after which they should be removed.

As to whether the city was under obligation to erect a fence or other barrier along the embankment, we think that depends upon whether, on all the facts of the case, the street

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was reasonably safe for travel without this fence. If so, then the city is not required to erect same.

Cities are not required to insure by this means the absolute safety of the traveler against the possibility of injury, but only to make and keep their streets reasonably safe, and this is a question for the jury.

Upon these issues presented by the pleadings as to whether said street was so obstructed as to render same dangerous and unsafe for public travel, and whether plaintiff was injured by reason of same, and as to whether plaintiff was himself guilty of such negligence as to prevent his recovery, were all questions of fact for the determination of a jury under appropriate instructions by the court.

Under the usual rule that, admitting every fact given in evidence to be true, and every inference reasonably deducible therefrom, if plaintiff has made out his case, it is error to take the case from a jury by a peremptory instruction. Viewing the evidence in this light, and under the principles of law herein announced, which we think applicable to the case, we think the court erred in giving the instruction asked for.

We refer for authority herein to Elliott on Roads and Streets, pages 451-2-3; same, as to notice to the city, p. 461, and to Dillon on Municipal Corporations, secs. 730, 1008, 1017, 1024, 1025.

Judgment must be reversed and cause remanded for further proceedings consistent with this opinion.

CASE 11—PETITION EQUITY—MARCH 7.

Tygret, &c v. Potter & Co.

APPEAL FROM WARREN CIRCUIT COURT.

1. **CONDITIONAL SALES—MORTGAGE.**—Where a mortgagor being unable to pay the mortgage debt executed to the mortgagee an absolute conveyance of the mortgaged land, the mortgagee surrendering the evidence of his debt and executing to the mortgagor a writing agreeing to re-convey to him the land if he should pay the debt within twelve months, these writings must be regarded as evidencing a conditional sale and not a new mortgage, and the debtor failing to pay the debt within the time allowed the absolute fee to the land passed to the creditor. While a conveyance of this character in case of doubt is to be construed as a mortgage, there is no doubt in this case that a conditional sale was intended.
2. **PAYMENT OF USURY—LIMITATION.**—As the conveyance discharged the debt any usury embraced in the debt was then paid, and the right to recover the usury is barred by limitation, more than one year having elapsed.

H. T. CLARK FOR APPELLANTS.

1. The deed and defeasance executed in October, 1889, are to be regarded as one paper; and when so considered they constitute a mortgage. (Jones on Mortgages, vol. 1, sec. 250; 4 Walt's Actions and Defenses, p. 517, 519; 3 J. J. Mar., 85; 6 Ky. Law Rep., 366; Maxwell on Code Pleading, 536; 88 Ky., 199; 8 Bush, 687; 9 Ky. Law Rep., 714, 856.)
2. In all doubtful cases the chancellor will lean to the mortgagor. (Skinner v. Miller, 5 Litt., 84.)
3. Courts of equity will look to the substance of a conveyance. (9 Wheaton, 489.)
4. Surrender of the right to redeem will be scrutinized. (Russell v. Southard, 12 How., 139; Jones on Mortgages, vol. 1, p. 181, sec. 250.)
5. As long as the debt exists the debtor can have the usury taken out. (Ellis v. Brannin, 1 Duv., 49; Rudd v. Planter's Bank, 78 Ky., 513; Neal v. Rouse, 14 Ky. Law Rep., 126.)
There was not a novation. (Smith v. Young, 11 Bush, 397; Barlow v. Bond, 3 Dana, 595; 2 B. Mon., 336.)

CLARK & CLARK COUNSEL FOR APPELLANT.

JNO. M. GALLOWAY FOR APPELLEES.

Where mortgaged premises are conveyed by the mortgagor to the mortgagee in satisfaction of the mortgage debt, so that no recovery can be had upon such original debt, the transaction will be considered a sale. (*Rue v. Dole, et al.*, 107 Ill., 275.)

In cases in which the court has held transfers from debtor to creditor to be mortgages and not sales, inadequacy of price has usually been a controlling fact. (*Edrington v. Harper*, 3 J. J. Mar., 359; *Bright v. Nagle*, 3 Dana, 252; *Perkins v. Dye*, 3 Dana, 170; *Honore v. Hutchinson*, 8 Bush, 687; *Gray v. Prather*, 2 Bibb, 223; 3 *Pomeroy's Equity*, sec. 1195.)

Here this controlling element of equity is wanting. Again, it is of the essence of a mortgage to be a security for the payment of money, and if the debt has ceased to exist the transaction is to be regarded as a sale and not a mortgage. (*Conway v. Alexander*, 7 Cranch; *Gray v. Prather*, 2 Bibb, 224; *Pomeroy's Equity*, secs. 1194, 1196, notes and cases cited therein; 2 *Devlin on Deeds*, secs. 1110, 1112; 1 *Jones on Mortgages*, 267, 269; *Holmes v. Grant*, 8 Paige, 257; *Chase's case*, 17 Am. Dec., 277 and notes to same, 300; *Slowey v. McMurray*, 72 Am. Dec., 251; *Bennett v. Holt*, 24 Am. Dec., 455.)

In this case it is alleged and not denied that the debt was cancelled and its evidence surrendered.

EDWARD W. HINES ON SAME SIDE.

As there was no inadequacy of price, and the evidence of the debt was surrendered, the transaction must be held to be a sale and not a mortgage, especially as appellees already had a mortgage and there could have been no reason for substituting one mortgage for another. (*McKinstrue v. Conly*, 12 Ala., 678; *Rue v. Dole et al.*, 107 Ill., 275.)

CHIEF JUSTICE PRYOR DELIVERED THE OPINION OF THE COURT.

The appellant, Tygret, being indebted to the appellees, P. J. Potter & Co., in the sum of \$4,242, executed to them his note payable in twelve months from date, and secured by a mortgage on several tracts of land, containing about one hundred and fifty acres.

After this note matured the appellant, not being able to make payment, and the debt amounting to \$4,678.60, with

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its interest, appellees purchased the land and surrendered the note, the appellant executing an absolute conveyance, acknowledging the receipt of the purchase money, the deed containing the usual covenants as to title.

At the time this deed was executed the vendees (appellees) executed to the appellant this writing: "We agree with John T. Tygret that he can have twelve months from this time in which to have the privilege of paying us the amount we this day paid him for certain lands this day deeded to us by said Tygret and wife, viz., the sum of \$4,678.60, the consideration expressed in said deed, and should said Tygret make such payment of said sum after the 12th of December, 1889, he is to pay us 8 per cent. interest per annum on said sum from said date, until time when he pays us, and should he thus pay us within twelve months, we are, upon said payments being made to us, to convey him or to his order the land this day conveyed to us, and should he fail to pay us said \$4,678.60 with interest from date, this contract is of no binding effect. We further agree should said Tygret not pay us the amount by December 25, 1889, we, P. J. Potter & Co., agree to rent him, said Tygret, the land for the year 1890, lease to begin December 25, 1889, and end December 25, 1890, and Tygret is to pay as rent \$375, and for this rent Tygret is to make us a well-secured note due December 25, 1890. When the lease expires said Tygert agrees to surrender the possession."

Signed:

"P. J. POTTER & CO."

"I agree to comply with the terms of this contract as to renting said property for the year 1890 should I not sell before December 25, 1889." Signed: "T. G. TYGERT."

Before the expiration of the twelve months, the time during which the appellant had the right to repurchase, the appellees, by the consent of the appellant, sold a part of the

land for \$2,500, and for the balance of the land it was agreed the appellant should pay as rent \$175.

There was also a verbal extension of time to enable the appellant to repurchase that was not complied with, and after notice to surrender the possession an action was brought by the appellees to recover the rent and the possession of the land.

The main defense is that the writings evidence a mortgage and not a conditional sale of the land. The defense also relies on the defense of usury, that if it ever existed is barred by the statute in the event this transaction was a sale and not a mortgage.

It is often difficult to determine the intent of parties with reference to conveyances of this character, and it is a well-settled rule of equity that when a doubt exists as to whether the writing is a sale or mortgage, that doubt is resolved in favor of the debtor, and the writing construed to be a mortgage.

In this case the appellees held a mortgage upon the entire premises conveyed at the time the deed was executed, that passed to the appellees all the right and title the appellant and his wife had in the land, as a security for the debt, and there could have been no motive prompting the parties to so change the terms of a writing that upon its face was plainly a mortgage, to an absolute conveyance, unless they both intended this conveyance to pass the absolute fee in the event the debt was not paid within twelve months, and at the end of that time the appellant to become the tenant of the appellees.

The evidence of the debt had been surrendered, and there is no evidence conducing to show the land to be of greater value than that paid for it, or that the agreement was unconscionable or oppressive, but on the contrary it is mani-

fest the appellant saw or believed he could not discharge or release the mortgage, and therefore made the best possible terms with his creditor; that was, to sell him the land, with the right to repurchase within twelve months, and if he failed to do so then to become his tenant. The fact that appellant obtained the consent of the appellees for the sale of a part of the land is no evidence that the writing was intended as a mortgage, because the twelve months in which he had the right to have this land reconveyed had not expired. This sale evidenced the fact, however, that the appellees did not want the land, and that appellant could not pay for it, and, therefore, consented to the sale, and every opportunity was given the appellant to comply with his agreement, but this he failed to do.

In *Rue v. Dole*, 107 Ill., 275, it was held in a case similar to this that in the absence of deception, fraud or oppression a conveyance of this character with a provision for a repurchase will be sustained, even if the land was sold at less than its full value. In this case the debt had been discharged. The conveyance was made in full satisfaction of the claim and no debt existed; if then the debt was discharged at that time—the date of the conveyance—the plea of usury, that 8 per cent. was included in the note or paid, is barred by the statute. That the writings express upon their face a sale of the land with the right of repurchase, and that such was the intention of both the debtor and the creditor, we have no doubt.

Judgment affirmed.

Leahy v. Leahy.

CASE 12—PETITION EQUITY—MARCH 7.

Leahy v. Leahy.

APPEAL FROM JEFFERSON CIRCUIT COURT, CHANCERY DIVISION.

1. **RIGHT OF WIFE TO SUE HUSBAND.**—The ordinary relation of debtor and creditor can not exist between husband and wife, although the wife may have been empowered to trade as a *feme sole*, as the statute does not enlarge the powers of the wife as to her husband. Therefore, the wife, although empowered to trade as an unmarried woman, can not sue the husband upon a note which he has executed to her unless she shows some equitable ground of relief. The mere fact that she sues in equity to enforce a lien by which the note is secured does not entitle her to recover.
2. **SAME—SEPARATE ESTATE.**—Ordinarily where the wife holds the note of the husband executed for money which belongs to her as her separate estate, and which he has obtained from her, with or without her consent, the chancellor may enforce her equity and require a settlement on her of such an estate as she may be entitled to. But the petition in this case does not state any ground for such equitable relief, nor is any shown by the evidence. While it is stated that the note sued on is plaintiff's separate estate this is rather a conclusion of law, there being no statement as to when or how it became so.
3. **THE HUSBAND WAS NOT COMPETENT TO TESTIFY** against the wife in support of the averments of his answer.

HUMPHREY & DAVIE AND M. A. SACHS FOR APPELLANT.

1. At common law the note by the husband to the wife was void. (Ellsworth v. Hopkins, 58 Vt., 705.)
2. The *feme sole* statute does not change the common law to the extent of allowing husband and wife to give notes to each other and sue each other upon them. (L. & N. R. Co. v. Alexander, 27 S. W. Rep., 981; Kalfus v. Kalfus, 92 Ky., 542; Lord v. Parker, 3 Allen (Mass.); Barnett v. Harshberger, 105 Ind., 414; Artman v. Ferguson, 73 Mich., 146; Small v. Small, 129 Pa. St., 366; Turner v. Nye, 7 Allen (Mass.), 176; 28 Fed. Rep., 602; Robey v. Felan, 118 Mass., 541; Kriel v. Eggleston, 140 Mass., 203; Woodward v. Spurr, 141 Mass., 283.)
3. If the *feme sole* statute had expressly given the husband and wife the right to give notes to each other and to sue each other the wife could not enforce the note by a sale of the property of the husband while he is alive. (Tucker v. Fenno, 110 Mass., 311.)

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4. Even if this were a case of a trust the wife does not come into equity with clean hands in this transaction, and, therefore, can not sue in equity. (*Kalfus v. Kalfus*, 92 Ky., 542.; *Walker's Adm'r v. Peck*, 19 S. E. Rep., 411; *Bohannon v. Travis*, 94 Ky., 59.)
5. If for any reason the court should hold that the wife may sue the husband, then it must follow the husband can testify. (*Spitz's Appeal*, 56 Conn., 154; s. c. 7 Am. St. Rep., 303; *Rivenburg v. Rivenburg*, 47 Barb., 423; *Commonwealth v. Sapp*, 90, Ky., 580.)

P. B. & UPTON W. MUIR FOR APPELLEE.

1. Appellant being the husband of appellee could not testify against her. (Civil Code, sec. 606, subsec. 1; *Commonwealth v. Sapp*, 90 Ky., 580; *Greenleaf on Evidence*, 13 ed., vol. 1, p. 402; 81 Ky., 10; 9 Bush, 717; *Kalfus v. Kalfus*, 92 Ky., 542; *Milton v. Hunter*, 13 Bush, 169; *Skinner v. Skinner*, 38 Neb., 956; *Greene v. Greene*, 60 N. W. Rep., 937.)
2. The wife may go into a court of equity to enforce a mortgage given by the husband to secure a loan made by her to him of her separate estate. (Civil Code, sec. 34, subsec. 1; *Atl. Nat. Bank v. Travener*, 130 Mass., 409, 410; 1 *Daniel's Ch'y Pr.*, 6 Am. ed., p. 109, note 7; 2 *Story's Eq. Jur.*, secs. 1368, 1414; *Van Duzen v. Van Duzen*, 6 Paige, 366; *Story's Eq. Pl.*, sec. 61 and note; *Long v. White*, 5 J. J. Mar., 230; *Dowell v. Covenhoven*, 5 Paige, 581; *Kenneth v. Winfield*, 4 Heisk, 440; 3 *Pomeroy's Eq.*, 319; *Schouler's Domestic Relations*, 3 ed., secs. 191, 194; *Wells on Separate Property of Married Women*, pp. 582, 583; 3 *Wait's Actions and Defenses*, 667, 668; *Idem*, p. 142; *Story's Eq. Jur.*, 12 ed., vol. 2, p. 616; 2 *Lawson's Rights, Remedies and Practice*, vol. 2, sec. 716; *Cord's Legal and Equitable Rights of Married Women*, sec. 979, c and d; *Cannel v. Buckle*, 2 P. Wms., p. 243; *Skinnner v. Skinner*, 38 Neb., 756; *Greene v. Greene*, 60 N. W. Rep., 937; *Price v. Cole*, 35 Tex., 470, 471; *Clark, assignee, v. Hezekiah*, 24 Fed. Rep., 663; *Pillow v. Sentelle*, 5 S. W. Rep., 783; *Manchester v. Tibbetts*, 18 Am. St. Rep., 816; *Power v. Lester*, 23 N. Y., 527; *Thomas on Mortgages*, sec. 113; *Strong v. Skinner*, 4 Barb., 546; *Proctor v. Cole*, 4 N. E. Rep., 303; *Tennison v. Tennison*, 46 Mo., 77, 81; *Wormly v. Wormly*, 98 Ill., 544; *Higgins v. Higgins*, 14 Abb. N. C., 13; *Scott v. Scott*, 13 Ind., 225, 230; *Waller v. Waller*, 48 Mo., 140; *Moore v. Moore*, 47 N. Y., 467; *Manning v. Manning*, 79 N. C., 296; *Alexander v. Alexander*, 7 S. E., 340; *Brown v. Brown*, 36 N. W., 275; *Lyons v. Zimmer*, 30 Fed. Rep., 411; *Atl. Nat. Bank v. Travener*, 130 Mass., 409; *Bryant v. Bryant*, 35 Ala., 290; *Ranney v. Ranney*, 35 Ala., 282; *Witman v. Abernathy*, 33 Ala., 154; *Pitman v. Pitman*, 4 Ore., 298; *Resor v. Resor*, 9 Ind., 347; *Martin v. Robson*, 65 Ill., 129; *Emerson v. Clayton*, 32 Ill., 493; *Remy v. Bailey*, 11

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Atl. Rep., 438; Atwood v. Atwood, 2 N. Y. Suppl., 42; Brickley v. Walker, 32 N. W. 773; Barbour v. Barbour, 21 How., 590; Medgaker v. Bonebrake, 108 U. S., 73; May v. May, 31 Am. Dec., 399; McCampbell v. McCampbell, 31 Am. Rep., 623; Hall v. Hall, 36 Am. Rep., 725; Webster v. Webster, 58 Me., 139.)

Kentucky Cases: Marshall v. Hutchinson, 5 B. Mon., 298; McCann v. Letcher, 8 B. Mon. 320; Campbell v. Galbreath, 12 Bush, 459; Miller v. Edwards, 7 Bush, 397; Campbell v. Campbell's Tr., 79 Ky., 399; Latimer v. Glenn, 2 Bush, 542; Long v. White, 5 J. J. Mar; Highland v. Highland's Adm'r, 13 Ky. Law Rep., 710; Maraman v. Maraman, 4 Met., 86; Darnaby v. Darnaby's assignee, 14 Bush, 487; Johnston v. Johnston, 14 Ky. Law Rep., 117; Veal v. Veal, 89 Ky., 314; Meade v. Stairs, 88 Ky. 72; Thomas v. Harkness, 13 Bush, 28; Polk v. Shanklin 79 Ky., 230; Bright v. Bright, 3 Bush, 155; Hall v. Hall, 89 Ky., 514.)

WM. LINDSAY FOR APPELLEE FILED PETITION FOR REHEARING.

JUDGE HAZELRIGG DELIVERED THE OPINION OF THE COURT.

The appellee is the wife of the appellant, and is seeking to enforce the collection of a note executed to her in 1876 by her husband for the sum of \$2,500, to secure which he executed a mortgage on a house and lot in Louisville.

It appears from the petition that the wife was empowered to trade as a *feme sole* at the time of the transaction, but whether she in fact owned any estate, separate or otherwise, is not alleged, nor does it appear that she in fact furnished the husband any money or other thing of value in consideration of which the note was executed. We are abundantly informed in the brief of counsel that the note was executed for money loaned by the wife to the husband, and which had belonged to the wife as her separate estate and which the husband converted to his own use, executing the mortgage as security therefor. The writings themselves are silent as to these equitable considerations, and the pleadings likewise. The wife's case, as set up in her petition, rests upon purely legal principles. She sues her husband just as she would sue any other person whose promissory note she might

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hold. It is true she sues in equity, but that is because of the lien secured to her by the mortgage.

She alleges, too, that the note is her separate estate, but this is rather a conclusion of law, and we are left to conjecture when or how it became so.

From these premises we might well determine that the plaintiff has not shown herself entitled to maintain the action. For it is abundantly established by all the authorities that the wife must assert some equitable grounds entitling her to relief before she may sue her husband. But waiving this question, we think it clearly appears from the pleadings and exhibits that the claim of the wife is devoid of merit.

The husband pleads that the note and mortgage are wholly without consideration. That prior to his intermarriage with appellee in 1867, he and his former wife, by whom he had a number of children, had accumulated a large estate, consisting in the main of real property in the city of Louisville, the deeds for which, beginning in 1853, he files with his answer. That after his last marriage he was induced to convey a large part of his property to his wife for the sole purpose of avoiding its loss in risky business ventures of which his wife pretended to be afraid, and that she so importuned him as to make him miserable and unhappy, and that in order to pacify her, he conveyed her a lot on Eighth street, of the value of \$5,000, bought by him in 1864; one on Magazine street, of the value of \$2,000, bought in 1863; one on Eleventh and Logan streets, valued at \$2,000, bought in 1853; one on Twelfth street, worth \$1,500, bought in 1868, one on Eleventh street, of the value of \$3,500, bought in 1868, and one on Broadway, worth \$2,000, bought in 1867.

The conveyances are filed and are in the record as evi-

dence. He avers that his wife owned, when he married her, a small millinery store, invoiced for \$450, and not worth more than that, which she continued to run with his aid until in 1882, when she sold it for \$1,100. She also owned a house and lot in Jeffersonville worth \$5,000; and this property she still owned. That he paid the taxes on her Jeffersonville property, and for repairs on it paid \$700. That she received all the rents of his property as well as the proceeds of the sale of other valuable real estate to the extent of many thousand dollars, the result of all which was to leave him substantially penniless in his old age.

These allegations the wife in general terms denied, but the conveyances show for themselves and no explanation is offered for their execution. The fact remains that she stands seized of the legal title to this large and valuable estate, which formerly belonged to the husband, and no explanation is made as to her ownership save that offered by the defendant.

The husband testifies in support of the averments of his answer, but his testimony is not competent. His son also testifies, and while too young at the time of the transactions to know much of them, what he does prove is corroborative of the contentions of the defendant. No proof is taken for the plaintiff, her sole reliance being that as she was empowered to trade as a *feme sole*, the subject matter of the litigation must necessarily have been her separate estate, and that this of itself affords the chancellor ground for exercising jurisdiction. And it may be admitted that ordinarily when the wife holds the note of the husband executed for money which belongs to the wife as her separate estate, and which has been obtained from her, with or without her consent, the chancellor may enforce her equity and require a settlement on her of such an estate as she may be entitled

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to. But, as we have seen, the petition in this case does not state any ground for equitable relief.

At best, it only establishes the naked relation of debtor and creditor between the husband and wife; and while it is contended that such a relation may exist between them as between strangers, by reason of the law empowering the wife to trade as a single woman, we think such a construction of the statute can not be adopted for obvious reasons. This court has strongly intimated to the contrary, if indeed its utterances may not be regarded as expressly determining otherwise.

In *Kalfus v. Kalfus*, 92 Ky., 542, and in *L. & N. R. Co. v. Alexander*, 16 Ky. Law Rep., 306, it was held that this statute only enlarges the powers of a married woman as to others than her husband, and the rights of husbands and wives as between themselves are not affected by it. In *Tucker v. Fenno*, 110 Mass., 311, the court said: "The statutes which have so greatly enlarged the rights and removed the disabilities of a married woman are not intended to place her and her husband in the necessarily adverse relation of debtor and creditor," and it refused to foreclose a mortgage for the wife saying that to do so "would be wholly inconsistent with the conjugal relation." She could not turn him out of possession, she could not compel him to render an account of rents and profits. They could make no binding contract and come to no valid adjustment as to the amount necessary for redemption. He could make no valid tender to her, nor could she give him a valid discharge or release. There is no mode in which their adverse rights could either be prosecuted or released or adjusted that would not be inconsistent with their relation to each other as husband and wife. Of course, when the wife shows herself entitled to equitable relief, it may be granted, but the burden of show-

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ing such equity is on her. In this case the appellee has wholly failed to do this. On the contrary, the record discloses an utter want of equity in her demand; so much so that the chancellor reluctantly entered the judgment in her favor, declaring that to do so was most "distasteful" to him.

In *Bohannon v. Travis*, 94 Ky., 64, this court said that a contract between husband and wife "will not be enforced in equity in favor of either unless it is fair and just, founded on a valuable consideration, and reasonably certain as to its stipulations and the circumstances under which it was made."

Let the judgment be reversed with directions to dismiss the petition.

CASE 13—PETITION ORDINARY—MARCH 8.

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APPEAL FROM BOYLE CIRCUIT COURT.

1. **RAILROADS—OVERHEAD BRIDGES—WILFUL NEGLIGENCE AS TO BRAKEMAN.**—A railroad company is guilty of wilful neglect in having an overhead bridge on its road under which brakemen on the top of freight trains can not pass without the exercise of more than ordinary care. And even though a bridge may be of such a height as to enable an ordinarily prudent brakeman to remain on top of the car when nothing intervenes to divert his attention from the necessity of stooping in order to pass through safely, still the company is guilty of wilful negligence as to a brakeman who by reason of some emergency which requires prompt action as his train approaches the bridge fails to discover his danger and is killed by coming in contact with the bridge.
2. **SAME—EVIDENCE AS TO ALTERATION OF BRIDGE AFTER ACCIDENT.**—The defendant was not prejudiced by the action of the court in admitting testimony to the effect that the bridge had been raised by defendant since the accident, it being shown by the testi-

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mony for defendant that the bridge was too low for a brakeman to pass under without stooping.

3. **SAME.**—The court properly instructed the jury that they should find for plaintiff if they believed from the evidence the bridge was not high enough to allow brakemen to pass under it "while in the discharge of their duties with reasonable safety to their persons while standing or walking on top of a freight train." It is not necessary to determine whether plaintiff would have the right to complain of a qualification of this instruction to the effect that the jury must find for defendant if they believe that the decedent knew the bridge was insufficient in height to enable him to pass under it.
4. **CONTRIBUTORY NEGLIGENCE.**—The court properly refused an instruction as to contributory negligence.
5. **MEASURE OF DAMAGES.**—The court properly told the jury that the criterion of damages was the power of the decedent to earn money had he lived, not exceeding the amount claimed.
6. **EVIDENCE AS TO SIZE OF DECEDENT'S FAMILY.**—The defendant was not prejudiced by the testimony of the widow that she had one child, as this condition of the decedent's family was not made an element of damage in any instruction to the jury.

C. B. SIMRALL FOR APPELLANT.

1. In the absence of proof supporting the allegations of want of knowledge upon the part of Sampson, and knowledge upon the part of the railroad, the defendant was entitled, upon the close of plaintiff's case, to a peremptory instruction. (*Bogenschutz v. Smith*, 84 Ky., 330; 2 *Thompson on Negligence*, p. 1008.)
2. Defendant was also entitled to a peremptory instruction upon the ground that the injury alleged in plaintiff's petition as a ground of recovery arose from a risk assumed by plaintiff's decedent in the line of his employment. (*Patterson on Railway Accident Law*, 308; *Pierce on Railways*, p. 380.)

Brakemen and other employees who enter the employment of the company with a knowledge of the height of a bridge assume the risk of injury therefrom as a part of the danger of employment. (*Owens v. N. Y. Cent. R. Co.*, 1 *Lans. (N. Y.)*, 108.)

And such risks are also assumed where the employee remains in the service of the company after he has acquired knowledge, or ought to have acquired knowledge, of its dangerous condition; and he will be charged with knowledge if he has been accustomed to pass beneath it so frequently that ordinary observation ought to have made him acquainted with the manner of its construction. (*Goff, Adm'r v. Norfolk, &c., R. Co.*, 36 *Fed. Rep.*, 299; *Corbine's Adm'r v. Benn. & Rut. R. Co. (Vt.)*, 38 *Am. & Eng. R. Cases*, 45; *Hooper v. Columbia R. Co.*, 28 *Am. & Eng. R. Cases*, 433; *B. & O. R. Co. v. Stricker*, 41 *Md.*, 47; *Pittsburgh, &c., R. Co. v. Santmeyer*,

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92 Pa. St. 276; Wells v. Bur., C. R. & N. R. Co., 56 Iowa, 520; Clark's Admr v. R. & D. R. Co., 18 Am. & Eng. Ry. Cases, 78; Gibson v. Erie R. Co., 63 N. Y., 449; Raines v. St. Louis, &c., R. Co., 71 Mo., 164; Baylor v. D., L. & N. N. R. Co., 40 N. J. Law, 23; Gibson v. Midland R. Co., 2 Ontario, 653; Brossman v. Lehigh Valley R. Co., 113 Pa. St., 490; Hughes v. Cincinnati, &c., R. Co., 91 Ky., 526; Nance's Admr v. Newport News, &c., R. Co., 13 Ky. Law Rep., 554; Derby's Admr v. Ky. Cent. R. Co., 9 Ky. Law Rep., 153.)

3. Sec. 3 chap. 57, of the Gen. Stats., regulated the right of recovery. (Wright v. Wood's Admr, 27 S. W. Rep., 979; McClure v. Alexander, 24 S. W. Rep., 619.)

Therefore, there could be no recovery except for wilful negligence, which was not shown. (L. & N. R. Co. v. McKay, 81 Ky., 413; Claxton's Admr v. L. & B. S. R. Co., 13 Bush, 636; City of Lexington v. Lewis' Heirs, 10 Bush, 680; Jacob's Admr v. L. & N. R. Co., 10 Bush, 263.)

4. One entering the employment of another assumes all the risks and hazards ordinarily incidental to the duties of his employment, and the court erred in refusing to so instruct the jury. (Cooley on Torts, 541, note 1; Wood on Master and Servant, sec. 626; Bailey's Master's Liability for Injury to Servant, 152; Pierce on Railways, 379; Patterson's Railway Accident Law, 343; Gibson v. New York, &c., R. Co., 63 N. Y., 449; B. & O. R. Co., v. State, 41 Md., 268; Bogenschutz v. Smith, 84 Ky., 336; L. C. & L. R. Co., v. Caven's Admr, 9 Bush, 568; L. & N. R. Co. v. Brooks, 83 Ky., 135; Sullivan's Admr v. Louisville Bridge Co., 9 Bush, 88.)

This court has applied this principle to employes working on the top of freight cars and in danger of being struck by overhead bridges. (Hughes v. Cincinnati, &c., R. Co., 91 Ky., 526; Nance's Admr v. Newport News, &c., Co., 13 Ky. Law Rep., 554; Derby's Admr v. Ky. Cent. R. Co., 9 Ky. Law Rep., 153.)

5. The court erred in refusing an instruction to the effect that if the jury believed that the negligence of Sampson was the proximate cause of his injury the jury must find for defendant. (M. & St. P. R. Co. v. Kellogg, 94 U. S., 469; 2 Thompson on Negligence, 1151; Shearman & Redfield on Negligence, sec. 10.)
6. The instruction given was erroneous. It absolutely condemns the bridge at which Sampson was killed and takes from the jury the consideration of the question as to whether it was negligence to maintain the bridge as constructed.
7. The court erred in admitting testimony as to the change in the bridge since the accident. (Columbia & Puget Sound R. Co. v. Hawthorne, 144 U. S., 202; Standard Oil Co. v. Tierney, 92 Ky., 368.)

Additional cases cited upon this point in petition for rehearing:

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Nalley v. Hartford Carpet Co., 51 Conn., 524; Baird v. Daily, 68 N. Y., 547; Dugan v. Champlain Transportation Co., 56 N. Y., 8; Ely v. Ry. Co., 77 Mo., 34; Crouch v. Watson Coal Co., 46 Iowa, 18; Hudson v. C. & N. W. Ry., 59 Iowa, 581; Long v. Sanger, 44 N. W. Rep., 1095.

J. W. YERKES OF COUNSEL ON SAME SIDE.

ROBERT HARDING FOR APPELLEE.

1. It was the duty of appellant to have constructed and maintained the bridge of a sufficient height from its roadbed to have enabled brakemen to stand erect upon the cars ordinarily in use upon its road while in the discharge of their duty to it, and to pass under this bridge in safety. (Derby's Adm'r v. Ky. Cent. R. Co., 9 Ky. Law Rep., 153; St. Louis R. Co. v. Irvin, 1 Am. St. Rep., 266; Beach on Contributory Negligence, sec. 134.)

It is the duty of the master not to expose the servant, when conducting the master's business, to perils and hazards against which he may be guarded by proper diligence on the part of the master. (Hough v. Railway Co., 100 U. S., 216; Chicago, &c., R. Co., v. Sweet, 45 Ill., 197; Ill. Cent. R. Co. v. Welch, 2 Ill., 183; Chicago, &c., R. Co. v. Russell, 91 Ill., 289; 2 Thompson on Negligence, p. 1012.)

2. The failure upon appellant's part to construct this bridge of a sufficient height to enable brakemen to pass under it in safety was wilful negligence against which contributory negligence can not be pleaded as a defense. (Derby's Adm'r v. Ky. Cent. R. Co., 9 Ky. Law Rep., 153.)
3. The testimony as to the raising of the bridge was competent for the purpose of showing that appellant was controlling and maintaining this bridge.

ROBERT J. BRECKINRIDGE AND J. W. RAWLINGS OF COUNSEL
ON SAME SIDE.

CHIEF JUSTICE PRYOR DELIVERED THE OPINION OF THE COURT.

The personal representative of James R. Sampson brings this action to recover for the loss of life of his intestate, alleging he was killed by coming in contact with an overhead bridge constructed by the appellant, the Cincinnati, New Orleans & Texas Pacific Railway Company, on its road, while he was in its employ as a brakeman, and in the discharge of

a duty he owed the company by reason of that employment.

The basis of the recovery is the alleged wilful neglect of the appellant in the construction and maintenance of its bridge, in such a manner as rendered it more than ordinarily hazardous to its employes, who were acting as brakemen. The appellee's intestate had been in the employ of the company on this part of its road but a short time before his death, about one month, but had much experience as a brakeman, having been in the employ of railroad corporations since he was twelve years old, but seems to have been on this part of the appellant's road but a short time.

The train upon which the intestate was killed was going south and composed of twenty-six cars; it was on a down-grade as it approached the bridge, and running at a speed of fourteen or fifteen miles an hour, and when within a half mile of the bridge the pin used in coupling the cars came out, when the train divided, leaving the intestate on the one section and other employes upon the other. The intestate was in the cab at the time, but instantly left, climbing from the cab to the box cars, and going to the rear end of the first section and, as we must assume, to signal those on the second section, as was his duty, so as to prevent a collision. It is conceded that this was his duty, and in the attempt to discharge it he met with the misfortune that ended his life. The back of his head and his shoulders were horribly mangled, and the evidence of his coming in contact with the bridge causing his death is conclusive. His back must have been toward the bridge with his face fronting the section behind, and from the effort to discharge his duty, connected with the alleged negligence of the appellant, his death is said to have resulted.

The pleadings make up the issue, as to the knowledge of the condition of the bridge on the part of the company, and

the want of knowledge on the part of appellee's intestate, and if wilful neglect is established, the judgment below will not be disturbed. There is some evidence conducing to show that the bed of the railroad had been raised since its original construction, which would lessen the distance from the rails below to the bridge above, but when that was done does not distinctly appear, and it being conceded in argument, and it appearing from the testimony of appellant's own witnesses, that this bridge was too low for brakemen to pass under it standing erect, without the loss of life, or subjecting their person to great peril, we will consider this case upon the character of its construction as appellant concedes it to have been when this accident happened, and the peril in which the intestate was required to place himself in the discharge of a duty imposed upon him by his employer.

Railroads, as this court has heretofore said, are not insurers of the lives or safety of their employes, but must provide reasonably safe appliances for their safety, and if the bridge causing this accident was of such a height as enabled its employes to pass under it by the exercise of only ordinary care on their part, a case of wilful neglect has not been made out by the testimony, and a non-suit should have been directed by the trial court.

It is contended that this bridge has been constructed for many years, and no employe having been injured or killed by reason of its construction, it must be assumed that it is such a structure as is reasonably safe for its employes. We can not adopt this view of counsel, but on the contrary, it is plain from the record before us that this overhead structure was in no such condition as enabled this employe to discharge the duty he owed the company, and at the same time, however careful, protect himself from the danger impending by reason of the unsafe condition of the bridge. The

employe assumes the ordinary risks pertaining to an employment that is often and necessarily attended with much danger, but this does not exempt the railroad company from liability when reasonable precaution on its part would save its employes from harm, and in a case like this where the exercise of the slightest care would have prevented the accident. There can be and has been no reason assigned in this case why a corporation with the means to construct a railway would in the construction of small or large bridges, leave them in such a condition as involves its employes, brakemen, in imminent peril when passing through them, when with a small expenditure such structures in this regard could be made perfectly safe. We are aware of many reported cases, some of which have been referred to by counsel, where the absence of ordinary care and the means of knowing the condition of the bridge by the employe have been held as relieving the railway company from responsibility in such cases. This court, however, has not followed or approved those decisions in reference to such structures, but on the contrary in the case of *Derby's Admr. v. The Kentucky Central Railroad Company*, 9 Ky. Law Rep., 153, plainly intimated that if the intestate in that case had been required to be on top of the car as it passed through the structure in discharge of his duty, and was killed by reason of its being too low for the cars to pass under, the brakeman standing erect upon them, a recovery would have followed. In that case the jury by their verdict said the structure was sufficiently high to enable one standing erect on the cars ordinarily used by the company to pass through safely, and the judgment for the defendant was affirmed, not only on the ground that the intestate knew the car he was on was too high for him to stand upon, but for the additional reason that he was master of the train, and had made it up, placing

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in the train this high car that belonged to another road.

Mr. Beach in his work on Contributory Negligence, 364, says: "If the roof or overhead structure of the bridge is so low that it will strike a brakeman standing erect on top of the train it is an essentially murderous contrivance, and it is not creditable to our jurisprudence that such buildings are not declared a nuisance. There is nothing in the reports worse than the cases that sustain the railway corporations in building or maintaining these man-traps." See also *St. Louis &c. R. Co. v. Irwin*, 37 Kan., 701. In the case of *Wright*, on the appeal of the Louisville, New Albany & Chicago Railway reported in 115 Ind., 378, a like accident happened to the brakeman, and on the trial of that case (an action for damages) it appeared that *Wright* had been in the employ of the company about one month, and had passed through the bridge several times. Still the jury under proper instructions returned a special finding to the effect he had no knowledge of the perilous condition of the structure, and the court upon the motion for a new trial sustained the verdict. The only difference between that case and the one being considered is that in this case the intestate had more experience with reference to railroading than *Wright*, the right of recovery in either case depending upon the fact whether the overhead structure was in such a condition as enabled the employe to perform his duties with reasonable safety. The jury have by their verdict said the intestate was ignorant of the condition of the structure, and while his own version of the accident went to the grave with him, the facts and circumstances connected with his death were such as authorized the jury to say that his efforts to check the broken train indicated a belief on his part that the structure was of sufficient height to enable him to pass in safety. The structure may have been in such a condition as to en-

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able an ordinarily prudent brakeman to remain on top of the car when nothing intervened to divert his attention from the necessity of stooping in order to pass through safely, but when by reason of the separation of the train, or some other unexpected obstruction to the movement of the train, as it approached the structure, that required prompt and speedy action on the part of the brakeman to save the lives of passengers or the collision of one part of the train with the other, can it be said under such circumstances that that bridge is reasonably safe to the employe discharging such duties, when by the slightest care and precaution on the part of the company, the employe can be protected when undertaking such hazardous risks? It is plain to us this brakeman could not have discharged the duty imposed upon him that resulted in his death by the exercise of ordinary care and thus saved his life, or that such a risk as he was required to take upon himself when killed, with reference to the location of this bridge, was such as is usually incidental to the employment.

The court in *Derby's Admr. v. Kentucky Central Railroad Company*, 9 Ky. Law Rep. 156, before cited, in reference to the argument that railroad companies should be required to construct their bridges and make up their trains so as not to expose the person of the brakeman to danger, said that a consideration of humanity should prompt them to do so, and it seems to us a failure in that regard is the highest degree of negligence.

In the case of the *Chicago &c. R. Co. v. Johnson*, 116 Ill., 206, the court said: "When a railroad company constructs a covered bridge along the line of its road it should be built of sufficient height so that persons employed by the railroad company as brakemen and who are required to go on top of the freight cars discharging their duties as brake-

men, while going through a bridge, may pass through and under it without danger to their personal safety, and the law does not require of a brakeman that he should absolutely know all the defects of construction, and all the obstructions that may be along the line of the road."

We can perceive no distinction between a covered bridge and one without a top, save in the former, obstructions may be concealed on the inside not visible to the brakeman, but the court in that case was discussing the necessity of having the structure of sufficient height to enable the employes to pass over it with reasonable safety, and certainly of such height as to enable the brakeman to save himself from harm when duty to his employer requires him to take extraordinary risks for the preservation of life and property. The facts of this case come up to the full meaning of the term, "wilful neglect," as defined by this court. They manifest what is equivalent to intentional wrong, and a recklessness evidencing the absence of all care for the safety and protection of its brakemen.

During the progress of the trial witnesses examined for the defense as well as those for the plaintiff were asked the question: "Has not the bridge been raised higher since the accident?" The answer was: "Yes, about eighteen inches or two feet." Objections and exceptions were properly made and taken for the reason that such testimony would authorize the inference that this was an admission of the negligence. The objection might be available if it was not shown by the testimony for the appellant, and from the undisputed facts, that the structure was too low for a brakeman to pass through without stooping, as upon this fact, combined with the circumstances attending the loss of life, the recovery must depend.

Several instructions were offered by the defense and re-

fused. These instructions embraced the law of contributory neglect, the care the employe must take for his own safety, and the duty of the company to provide reasonably safe appliances for the protection of its employes. If a recovery is proper in this case the instructions should have been refused, and in our opinion the two instructions given by the court embodied the law.

"The court instructs the jury it was the duty of the defendant in the construction and maintenance of this overhead bridge where decedent was killed, to so construct and maintain it, as to the height thereof, that its brakemen on top of the trains could pass under it while engaged in the discharge of their duties, with reasonable safety to their persons, while standing or walking on it, and if you believe from the evidence in this case the bridge was not so constructed and maintained as to the defendant as to the height thereof, and by reason thereof decedent was killed, you shall find for the plaintiff, unless you believe from the evidence that decedent knew the said bridge was insufficient in height to enable him to pass under it with safety while on it, or that he recklessly and with indifference to the consequences exposed himself to the danger, in which latter state of case you will find for the defendant."

The second instruction was as to the measure of damages, "the criterion of which was the power to earn money had he lived, not exceeding the amount claimed."

The instruction given in regard to negligence is based on such facts as would authorize the court to say to the jury as a matter of law that if the bridge was not of sufficient height to enable the brakeman to pass with reasonable safety the company was guilty of wilful neglect, and under the former decisions of this court it was doubted by Justice Lewis in his dissent in *Derby's Admr. v. The Kentucky Central Rail-*

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road, whether if guilty of wilful neglect the issue of knowledge or want of knowledge on the part of the decedent as to the danger of the structure should have gone to the jury. The jury, however, passed on the question in this case and rendered a verdict for the plaintiff.

The widow was introduced as a witness and stated she had one child. This condition of his family was not made an element of damage in any instruction, and no reversal should be had on that ground.

The judgment below is affirmed.

CASE 14.—INDICTMENT—MARCH 8.

Clark v. Commonwealth.

APPEAL FROM JEFFERSON CIRCUIT COURT, CRIMINAL
DIVISION.

EMBEZZLEMENT.—Where an agent or servant of a corporation converts to his own use money which he has collected for the corporation he is guilty of embezzlement, although he may have been entitled to a commission for collecting. The rule that where one follows collecting on commission as a business he is not guilty of embezzlement if he fails to pay over has no application.

ALFRED SELLIGMAN AND CHARLES G. RICHIE FOR APPELLANT.

1. The corporate existence of the Singer Manufacturing Company is not established by the evidence. The act of the New Jersey Legislature relied upon leaves certain matters to be performed before the corporation becomes an entity, and the performance of these things is not shown.
2. The indictment is defective in that it does not give the names of the persons from whom the money was collected.
3. Under the contract there were two condition precedents to Clark's Agency: First, a written authority to collect, and, second, an assignment of territory; and yet upon neither of these vital points was there any testimony offered.

97	76
104	223
97	76
115	488
97	76
1126	539

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4. By the terms of the contract Clark's commission on the funds collected gave him such an interest in the fund as to make him a joint owner with the Singer Manufacturing Company, and to preclude all the possibilities of embezzlement. (6 Am. & Eng. Enc. of Law, 474-5; State v. Kent, 22 Minn., 41; Carter v. State, 53 Ga., 326; Commonwealth v. Libbey, 45 Am. Dec., 185; Commonwealth v. Sterns, 2 Met., 34; Webb v. State, 8 Texas App., 310; 4 Lawson's Crim. Dec., 894; Rapalje on Embezzlement, 721; Hollem's Case, 2 Lew., 256; 2 Archb. Criminal Pleading & Practice, 569, note; 2 Bishop, 355-6; Commonwealth v. Foster, 107 Mass., 221.)

WM. J. HENDRICK, ATTORNEY-GENERAL, ERNEST MACPHERSON
AND H. H. NETTLEROTH FOR APPELLEE.

1. The Singer Manufacturing Company was incorporated and exists by and under a special act of the New Jersey Legislature. The only condition precedent to its beginning business under that act is shown to have been performed.
2. It was not necessary to allege in the indictment the names of all the persons from whom the money was received. (Brown v. State of Ohio, 18 Ohio St., 513.)
3. The authority of Clark to collect is shown by the evidence.
4. Appellant had no claim against the Singer Manufacturing Company for commissions, except in cases where he collected money and *turned same over to the corporation*. As appellant never turned over the funds he collected he was not entitled to any commission.

JUDGE GUFFY DELIVERED THE OPINION OF THE COURT.

In November, 1894, an indictment was returned by the grand jury of Jefferson county against the appellant, S. M. Clark, accusing him of the crime of embezzlement, averring in substance that he being an agent and servant of the Singer Manufacturing Company, a corporation existing under the laws of the State of New Jersey, and at the time doing business in Kentucky, did feloniously, wilfully, etc., convert to his own use \$271.25 in lawful money, the personal property of said corporation, which had come to his hands etc. as such agent, and had wholly failed to pay over or account for the same. A demurrer to the indictment was

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overruled by the court and a trial in the Jefferson Circuit Court resulted in a verdict of guilty and fixing the punishment of appellant at confinement in the penitentiary for a term of three years.

Defendant filed grounds for and moved the court for a new trial, which motion was overruled by the court, and judgment entered in accordance with the verdict, and defendant has appealed to this court and asks a reversal upon the following grounds, viz:

1. That the verdict is contrary to law.
2. Because the verdict is contrary to the evidence.
3. Because the court erred in the instructions given.
4. Because the court erred in not giving the full law of the case.

Appellant also insists that the court should have given a peremptory instruction to find for defendant, and that it was not shown that the Singer Manufacturing Company was legally organized, and that the demurrer should have been sustained. That as defendant was entitled to a commission of 5 per cent. on the money for collecting, etc., that he could not be guilty of embezzlement.

It seems to us that the organization of the company was sufficiently proven, and that the demurrer was properly overruled. There was some proof introduced conducing to show that defendant had converted to his own use some of the money which, as agent of the corporation, he had collected. The written contract filed, together with other evidence, seems to show that defendant was the agent of said company. If the defendant was the agent or servant of the corporation the fact that he was entitled to 5 per cent. for collecting would not protect him if he in fact embezzled the money so collected. See 6 American and English Encyclopedia of Law, pages 475-6, and numerous cases there cited.

Tabler, &c v. Sullivan.

It is true that where one follows collecting on commission as a business he can not be found guilty of the crime of embezzlement on account of failure to pay over. Numerous decisions might be cited to this effect, but the above reference is deemed sufficient. No proof at all was introduced by defendant tending or attempting to show that collecting was an independent business in which he was or had been engaged, nor any proof contradicting or explaining the evidence adduced by the prosecution.

Although the punishment may be severe or seem harsh, yet this court has no legal power to interfere. The jury were the judges of the evidence and also of the punishment to be inflicted, within the limits prescribed by law.

The judgment is therefore affirmed.

CASE 15—PETITION EQUITY—MARCH 8.

Tabler, &c v. Sullivan.

— APPEAL FROM MERCER CIRCUIT COURT.

HOMESTEAD.—The statute prescribes the particular mode in which a homestead right may be released or waived, and strict compliance with the statute is indispensable to such release or waiver.

Where a debtor after executing a deed to land executed to the grantee a deed of assignment of all his property for the benefit of his creditors, and thereafter a suit by a creditor to set aside as fraudulent the former deed was compromised and an agreed judgment entered directing a sale of the property embraced in that deed as a part of the trust estate, the assignee to be reimbursed out of the proceeds for what he had paid on the property, this compromise judgment operated to restore to the debtor and his wife the homestead exemption in the property conveyed, and they are entitled out of the proceeds of the property to one thousand dollars in lieu of the homestead exemption, notwithstanding the fact that at the time of the compromise they exe-

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cuted to the assignee a writing transferring to him all of their claim for homestead exemption under the deed of assignment, that writing never being acknowledged or recorded as required by the statute in order to pass the homestead. The fact that the assignee entered into the compromise upon the faith the debtor and his wife would transfer the homestead exemption to him does not deprive the debtor and his wife of their right to the fund set apart in lieu of the homestead.

CHARLES H. RODES AND GAITHER & VANARSDALL FOR APPELLANTS.

1. The court erred in not adjudging Mrs. Tabler to be entitled to one thousand dollars in the proceeds of sale in lieu of her homestead.

The husband can not divest himself or his wife of the homestead by a deed of assignment, in which the wife does not join. (11 Ky. Law Rep., 62.)

A waiver of the homestead exemption must be in the manner pointed out by the statute. (Ballard's Real Estate Statutes, sec. 262 and notes thereto.)

2. Where a married woman has no power to contract she can not by her fraud render a contract which she undertakes to execute binding as an estoppel. (2 Bishop on Law of Married Women, secs. 489, 490; Owens v. Snodgrass and Wife, 6 Dana, 231.)

In Connolly v. Branstler, 3 Bush, 702, the wife's conduct was entirely disconnected with any contract on her part. But in the case at bar there was no fraud practiced by Mrs. Tabler.

THOMPSON & WILSON FOR APPELLEE.

1. The deed of May 5, 1891 divested appellants of all right, title and claim to the Vivion property of every character and description.
2. The deed was never cancelled or annulled by the voluntary act of the parties or by the compromise judgment, and was never intended to be so annulled or set aside.
3. Sullivan has never alienated or parted with title or any right of his under the deed of May 5, 1891, except so far as the creditors of Tabler are concerned and his vendee, Vivion.
4. There is no voluntary conveyance nor any judgment of any court which reinvests Tabler and wife with the fee to the property or any interest in the proceeds thereof.
5. They are estopped by their acts and contract of February 27, 1892, to claim homestead. (Connolly v. Branstler, 3 Bush 702.)
6. Appellants having received the benefit of the \$2,700 paid by appellee under the deed of May 5, 1891, and from the identical prop-

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erty, they should not now be heard to ask for more. Homestead in the same property can not be twice allowed. (*Whitesides v. Cushenberry*, 8 Ky. Law Rep., 590.)

7. If the paper or assignment of February 27, 1892, had reference to the proceeds of the sale of the property held by appellee under the deed of May 5, 1891, then Tabler had the right to alienate that fund without consulting the wife or joining her with him, and the paper in question was amply sufficient for the purpose without the signature of the wife. (*Allensworth v. Kimbrough*, 79 Ky., 334.)

JUDGE LEWIS DELIVERED THE OPINION OF THE COURT.

May 5, 1891, M. Tabler and wife, Susie B. Tabler, for the recited consideration of \$3,000 in hand paid, and \$2,500 to be paid twelve months thereafter, for which a note was given, conveyed by deed duly acknowledged, to C. B. Sullivan, a tract of seven acres of land whereon was a dwelling house in Harrodsburg. And September 5, 1891, M. Tabler, his wife not uniting, conveyed to C. B. Sullivan in trust for payment of debts, all his other property real and personal, including choses in action, except such as was exempt from execution.

January 13, 1892, the Mercer Grain & Coal Company, creditor of M. Tabler, instituted an action against him and C. B. Sullivan to set aside the deed of May 5, 1892, upon alleged ground it was fraudulently made to cheat, hinder and delay creditors, and in contemplation of insolvency with design to prefer. February 12, 1892, an agreement to compromise that action was made by the parties thereto in substance as follows: That the lot was to be sold by Sullivan as trustee as if it had not been deeded to him, but had passed under the deed of trust of September 5, 1891, to him as trustee of Tabler. That out of proceeds of the sale Sullivan was to retain \$2,700 and interest, being as recited in the article of compromise, actual amount in cash paid at time of sale and deed of May 5, 1891. That the residue of proceeds was

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to be reported to Mercer Circuit Court and constitute and be distributed as assets, under judgment. It was further agreed that M. Tabler surrender all right to redeem the property which he had under contract between him and Sullivan, and have benefit of the provisions of the deed of September 5, 1891, and he and his wife were to convey by general warranty to purchaser of the property when sold.

That compromise agreement was filed in and entered as judgment of the court, and subsequently there was a judicial sale of the property at the price of \$5,500. But the purchaser refusing to accept a conveyance otherwise, C. B. Sullivan as trustee, and individually, and also Tabler and wife, united in a deed of the property.

The present controversy being between Sullivan and Tabler and wife, is whether \$1,000 of proceeds of the seven acres of land, set apart by judgment after sale was made, in lieu of homestead right therein, belongs to him or to them. And the lower court having adjudged he was entitled individually to the fund, they have appealed.

The basis of Sullivan's claim to the fund is the following attempted transfer and assignment, executed by Tabler and wife, February 27, 1892, same date as the compromise agreement: "The suit of the Mercer Grain & Coal Company having been agreed this day to be dismissed against C. B. Sullivan and the undersigned M. Tabler, now this instrument of writing transfers and assigns to said Sullivan all of our claim for homestead exemption *under deed of assignment of September 5, 1891*, made by me to said Sullivan, and the said Sullivan is hereby authorized to retain whatever sum is allowed to us as homestead exemption by the Mercer Circuit Court in the case of C. B. Sullivan, trustee of M. Tabler v. M. Tabler and others, and this shall be his receipt for the same."

Effect of the judgment rendered in pursuance of the compromise agreement was to set aside and cancel the deed of May 5, 1891, leaving the parties to it in the same attitude they were before it was made, and to subject the seven acres of land to sale under same conditions and for same purposes as was Tabler's other property rendered subject in virtue of the deed of trust of September 5, 1891; except that Sullivan was to retain out of proceeds amount of cash consideration for the land.

As then the compromise agreement when made judgment of court operated to restore the homestead exemption right in the seven acres of land as though it had never been conveyed or attempted to be conveyed, the result is it could not be released or waived except in the manner prescribed by the statute. And as the written transfer relied upon by Sullivan was, though signed by Tabler and wife, never acknowledged or recorded as required by the statute in all cases, it was ineffectual to divest them or either of them of the homestead right. Nor does the fact Tabler and wife agreed to release it, or the additional fact Sullivan entered into the compromise upon faith they would release and transfer the homestead exemption to him, deprive them of their right to the fund set apart in lieu of it. The statute prescribes the particular mode in which a homestead right may be released or waived, strict compliance with which this court has often held to be indispensable, and Sullivan must now abide the consequence of failing to procure such release or waiver in the only sufficient and effectual mode.

Wherefore the judgment is reversed and cause remanded for further proceedings consistent with this opinion.

CASE 16—PETITION EQUITY—MARCH 9.

Luttrell v. Wells, &c.

APPEAL FROM MASON CIRCUIT COURT.

1. **CONSTRUCTION OF DEVISE FORBIDDING SALE OF LAND.**—The fact that a testator provides that land devised to one person for life, remainder to others, shall remain in possession of the life tenant as long as he lives, and at his death be sold and the proceeds divided among the remainder-men, can not be regarded as forbidding a sale of the land during the life of the life tenant for the purpose of reinvestment, as provided by sec. 491 of the Civil Code.
2. **IN PROCEEDINGS UNDER SECTION 491, THE BOND PROVIDED FOR BY SECTION 493, OF THE CIVIL CODE, IS NO LONGER REQUIRED** where the court by its commissioner retains the custody and control of the fund arising from the sale, and orders the money to be paid by the commissioner directly to the person from whom the purchase for reinvestment is made, the bond being dispensed with in such cases by amendment to the Code of May 9, 1892, which was before the institution of this action.
3. **SALE OF CONTINGENT REMAINDER—PARTIES TO ACTION.**—A perfect title may be passed in such a proceeding, although the remainder be contingent, provided the person in being in whom the remainder would have vested if the contingency had happened before the commencement of the action be properly before the court.
4. **JUDICIAL SALES—SALE MUST BE PUBLIC AND ON CREDIT.**—By express provision of sec. 696 of the Civil Code, every sale made under an order of court must be public and upon reasonable credits, to be fixed by the court. Therefore, the court in this case had no power to authorize its commissioner to make a private sale or to sell for cash, and an exception to the report of sale upon the ground the sale was private should have been sustained.
5. **SALE ON LONGER CREDITS THAN JUDGMENT AUTHORIZED.**—Although the court by its judgment authorized the sale to be made either for cash or on certain specified credits, which were within those prescribed by law, and the sale was in fact made on credit, yet as the commissioner sold upon longer credits than was authorized by the judgment, this might have been a valid ground of exception for the purchaser if he had chosen to avail himself of it.

COCHRAN & SON FOR APPELLANT.

1. The fact that no bond was executed by the guardian of the infant

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defendants is fatal to the validity of the title acquired by appellant. (Civil Code, sec. 493, sub-divisions 1 and 3; *Malone v. Conn*, 23 S. W. Rep., 677; *Barnett v. Bull*, 81 Ky., 127; *Fritsch v. Klaus*, 11 Ky. Law Rep., 788.)

2. The provision in the judgment that the sale might be made privately and partly for cash was directly in the teeth of sec. 696 of the Civil Code., and for that reason the exceptions should have been sustained.
3. It was error to order the sale because a sale was forbidden by the will under which the property was held, and the exception upon that ground should have been sustained. (Civil Code, sec. 492, subd. 1; *Moore v. Thompson*, 80 Ky., 424.)

McGraw v. Minor, 12 Ky. Law Rep., 687, distinguished.

T. C. CAMPBELL AND W. J. HENDRICK FOR APPELLEES.

1. The amendment of May 9, 1892 to sec. 493 of the Code, dispenses with a bond in cases under sec. 491.
2. A sale is not forbidden by the will; but if it were, the court would still be authorized to order a sale for the purpose of reinvestment in other land. (*McGraw v. Minor*, 12 Ky. Law Rep., 687; *Lindemeier v. Lindemeier*, *Idem*, 766; *Robinson v. Fidelity Trust, &c.*, 11 Ky. Law Rep., 313).
3. It is not a valid objection to the sale that it was made privately. (*Irvin v. Walker*, 3 Ky. Law Rep. 473.)

JUDGE EASTIN DELIVERED THE OPINION OF THE COURT.

This is an equitable action brought for the sale of real estate in which there are remainders interests, for investment of the proceeds in other real property, under the provisions of sec. 491 of the Civil Code.

The property sought to be sold consists of a farm in Mason county, Kentucky, the title to which is held under the following provision in the will of Richard Wells, deceased, to-wit:

"I give and bequeath to my son, William Y. Wells, the rents and profits of the farm upon which he lives, during his life. Said farm contains about one hundred and ninety acres of land, and is to remain in the possession and under the control of William as long as he lives, and at his death, if his wife survives him, she is to have the use and profits of

said tract of land, until their youngest child arrives at the age of twenty-one years, then said farm is to be sold and the proceeds divided between the widow and children of William, she to take a child's part.

"Should William survive his wife, at his death the farm is to be sold and the proceeds divided between his children and their heirs; the heir of a child to take the share of the deceased parent should one or more of the children be dead when the land is to be sold and the proceeds divided according to the provisions of this will."

All persons in being who have an interest in the property were made parties to the suit, the plaintiffs being the life tenant, William Y. Wells, his wife and their six adult children, with the husbands of the daughters who are married, and the defendants being their two infant children and the executor of Richard Wells, deceased.

The petition alleges the fact, and proof was taken conducting to show, that a sale and reinvestment of the proceeds will benefit the parties interested in the property, a copy of the will under which the title is held was filed, a guardian ad litem was appointed and answered for the infant defendant, and at the June term of 1893, the circuit court adjudged a sale of the farm for the purposes set forth in the petition, and appointed William Y. Wells, the life tenant, and one of the appellees here, special commissioner to make the sale, and required of him a bond for the faithful discharge of his duties, which bond was executed and approved by the court.

In the judgment of sale, the commissioner was authorized to sell, either at public or private sale, for the best price obtainable, and either for cash, or on credits, not exceeding six, twelve and eighteen months, or for one-third cash and balance on time, not exceeding one and two years, and on

November 20, 1893, said commissioner reported to court a sale of the farm to appellant on September 6, 1893, at the price of \$20,002.50, of which \$1,000 was paid October 20, 1893, and \$5,667.50 was to be paid March 1, 1894, and the balance to be paid in two equal installments of \$6,667.50 each, on March 1, 1895, and March 1, 1896, respectively, for which deferred payments appellant had executed bonds, with surety, bearing interest from October 20, 1893, and to secure which a lien was retained. The commissioner also reported at the same time, the purchase of a farm in Shelby county, Kentucky, for the sum of \$20,000, as a reinvestment of the proceeds of the farm sold, the payments to be made practically on the same terms and at the several dates stipulated in his sale to appellant

Before the confirmation of said report of sale, the purchaser, appellant Thos. Luttrell, filed exceptions thereto, and moved the court to quash and set the same aside, for the following reasons, to-wit:

"1. Because no bond was executed as required by the Code, before the rendition of the judgment of sale.

"2. Because the sale was private and not at public sale.

"3 Because a sale and reinvestment of the proceeds is forbidden and prohibited by the will of Richard Wells, under which the title was held.

"4. Because these proceedings will not vest the title in the purchaser so far as the children of plaintiff, William Y. Wells, who may die before him, are concerned."

Upon the hearing of these exceptions by the court below, they were all overruled, and the report confirmed, to which the purchaser excepted and from which order he prayed this appeal.

As this case must be reversed, and as this court is of the opinion that at least one of the grounds of exception filed

by appellant should have been sustained, it might be sufficient to notice that exception alone, but, for the guidance of the appellees, in case they should desire to perfect the proceedings for the sale of this property, the court will now consider briefly and pass upon each of the several questions raised by appellant's exceptions.

In the first place, then, as to the objection based upon the idea that a sale of this property is forbidden by the will under which the title is held, the court is of the opinion that this exception was properly overruled, and that the will of Richard Wells does not, either expressly or by implication, prohibit the sale of this property by order of the chancellor for the purpose of reinvestment of the proceeds thereof. Such sale is certainly not forbidden in express terms, nor do we find in the language of the devise anything to lead us to the conclusion that this was the purpose or intention of the testator.

It is true that he provides that this farm "is to remain in the possession and under the control of William as long as he lives," but when we consider this language in connection with the devises over after William's death, first, to his wife, for a certain period of time, if she shall survive him, or, second, in case his wife shall have died first, to his children or the heirs of such of them as may be dead, then it seems to us that the purpose of these words was merely to emphasize the right of William to the use, benefit and enjoyment of this property during his life, without interference on part of the remaindermen or any other persons.

Nor does the fact that the testator has fixed a time at which the farm is to be sold, that is, when William's youngest child shall attain the age of twenty-one years, if William shall then be dead and his wife surviving, or at William's death, if his wife shall have theretofore died, necessarily or

reasonably imply a prohibition against the sale of the property for the purpose of reinvesting its proceeds when such sale will benefit all the parties whom he is seeking to benefit by this devise. He has directed the sale of the property for the purpose of division between the eight children of William, all of whom were living at the time of the execution of this will and of its probate, after the expiration of William's life estate, because only in that way could it be equally and advantageously divided between these beneficiaries in remainder.

In view of the language of the devise and in the light of former adjudications of this court, we conclude that a sale of this property for the purpose of reinvestment of the proceeds thereof under sec. 491 of the Civil Code, was not prohibited by the will under which the title was held, and therefore the exception on this ground was properly overruled. (*Lindemeier v. Lindemeier*, 91 Ky., 264; *McGraw v. Minor*, 12 Ky. L. R., 687.)

Then, as to the exception based upon the fact that no bond was executed to the infant defendants as provided in sec. 493 of the Civil Code, it need only be said that, under this section as originally passed, the omission to execute the bond referred to would have been fatally defective and would have rendered the sale absolutely void. But by an amendment to the Code, approved May 9, 1892, which was prior to the institution of this action, it is provided that no bond shall be required in cases under sec. 491 of the Code where the court shall, by its commissioner, retain the custody and control of the fund arising from the sale, until the same shall be reinvested, and shall order the money to be paid by the commissioner directly to the person from whom the purchase for reinvestment was made, as was practically done in this case. (Session Acts 1891-92-93, chapter

37, sec. 1, subdiv. 5, page 58.) This ground of exception was therefore properly overruled.

And then, as to appellant's fourth exception, which seems to be based on the idea that, as some of the children of William Y. Wells, the life tenant, may die before he does, in which event the share of the one dying is to pass to his "heirs," probably meaning children, and as it can not for this reason now be told who may become entitled to take in remainder under this will, therefore the purchaser can not get a perfect title under this proceeding, it is sufficient to say that sec. 491 of the Code was designed to meet such cases and that, although the remainder may be contingent, yet, if the person in being in whom the remainder interest would have vested, if the contingency had happened before the commencement of the action, be properly before the court, as seems to have been the case here, a complete and perfect title may be passed under a proceeding conforming to the provisions of that section and the subsequent sections of the Code regulating such proceedings.

But, as to the only remaining exception filed by appellant to this report of sale, and based on the fact that this was a private sale and not a public sale as required by law, we are of the opinion that this exception should have been sustained. The circuit court in its judgment authorizing this sale has expressly provided and undertaken to empower its commissioner to make this sale privately, and also to sell either for cash, or on certain specified credits, notwithstanding the provisions of section 696 of the Civil Code of Practice, which expressly forbid such private sale or sale for cash, in these words, to wit: "Every sale made under an order of court must be public, upon reasonable credit to be fixed by the court, etc."

There seems to be no room to doubt that the court was

wholly without authority to confer any such power on its commissioner, or that the sale of this property at private sale was unauthorized by law and void.

As to the terms on which the sale was made, it may be well to call attention to the fact that while the judgment of the court provides that the commissioner may make the sale either for cash, or on certain credits therein specified, which credits are within those prescribed by law, and while he did not sell for cash, but sold on credits which the law would authorize, yet he has exceeded the credits prescribed by the judgment itself. His report shows that he has extended the time of payment beyond that which was authorized by the court in its judgment, and this might have been a valid ground of exception for the purchaser if he had chosen to avail himself of it.

But, without further comment, it is enough to say that the sale of this property at private, instead of public, sale was directly in violation of the law regulating such sales, and for this reason the judgment of the lower court confirming the report of sale must be reversed, and this cause remanded for further proceedings consistent with this opinion.

Newport News, &c Co. v. Deuser.

CASE 17—PETITION ORDINARY—MARCH 9.

Newport News, &c Co. v. Deuser.

APPEAL FROM JEFFERSON CIRCUIT COURT, LAW AND EQUITY DIVISION.

1. RAILROADS—DUTY TO TRESPASSERS ON TRACK.—In this action against a railroad company to recover damages for injuries to plaintiff resulting from his being struck by a train of cars while he was walking on defendant's track, as the engineer admits he saw plaintiff when several hundred yards away, and believed from his movements he did not intend to leave the track until he reached a crossing some distance in front of him, the only issues were whether the danger signals were given in time to enable the plaintiff to step aside, and whether all reasonable means compatible with the safety of the passengers were used by the engineer to stop the train; and the court should, by its instructions, have confined the jury to these issues, and not have submitted the question as to the company's duty to keep a "look out," or as to plaintiff's knowledge of the approach of the train.
2. SAME—INSTRUCTIONS TO JURY.—It is immaterial so far as plaintiff is concerned whether a whistle was blown for a crossing near by, and as there was some testimony tending to show this signal was not given, it was misleading to instruct the jury that it was the duty of defendant to give "timely warning" by bell or whistle of the approach of its train to such persons as happened to be on its tracks in front of its moving train, as the jury may have supposed this "timely warning" referred to the signal for the crossing.
3. SAME.—In thickly populated vicinities, where many persons are known to be constantly passing about and across the road, as in a large city, the public interest and a due regard for human life require a constant look-out and the giving of appropriate signals, such as blowing the whistle and ringing the bell. But the conditions to which that rule applies do not exist here.

P. H. DARBY FOR APPELLANT.

1. Appellant was an adult in the apparent possession of his faculties, and the engineer seeing him upon the track had the right to assume that he would get out of the way of the train, and to act upon that assumption until there was reason to fear he might not do so. (*Lingenfelter v. L. & N. R. Co.*, 9 Ky., Law Rep., 116; L.

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- & N. R. Co. v. Coleman, 10 Ky. L. Rep., 81; Wren v. Louisville, &c., Ry. Co., 14 Ky. Law Rep., 325; L. & N. R. Co. v. Krey, 16 Ky. Law Rep., 64; Finlayson v. C. B. & Q. R. Co., 1 Dillon, Cir. Ct. Rep., 599.)
2. The increased or additional duty of trainmen at places where there is a customary use of the track by the public, over what is required of them at other places, relates to the precaution to be taken for the discovery of persons who may be upon the track. The duty to avoid injury to a person whose presence upon the track has been discovered is the same at all places. (L. & N. R. Co. v. Schuster, 10 Ky. Law Rep., 67; Hammill v. L. & N. R. Co., 94 Ky., 343; Lingenfelter v. L. & N. R. Co., 9 Ky. Law Rep., 116.)
3. License to walk on the track of a railroad in a country district is not implied from the mere fact that persons have frequently done so. (L. & N. R. Co. v. Howard, 82 Ky., 218)

BULLITT & SHEILD OF COUNSEL ON SAME SIDE.**A. T. KENDALL AND ANDREW A. HAGGAN FOR APPELLEE.**

If the engineer did not, after discovering appellee's peril, use such reasonable means as he had at hand to avoid injury, the company is liable. And it was the grossest of negligence for the engineer to let his engine run so close to appellee before giving notice of its approach. (L. & N. R. Co. v. Schuster, 10 Ky. Law Rep., 65, L. & N. R. Co. v. Coleman's Admr., 10 Ky. Law Rep., 81; Shelby's Admr. v. Cincinnati, &c., R. Co., 8 Ky. Law Rep., 929; Wren's Admr. v. Louisville, &c., R. Co., 14 Ky. Law Rep., 324; Hammill's Admr. v. L. & N. R. Co., 14 Ky. Law Rep., 291.)

JUDGE HAZELRIGG DELIVERED THE OPINION OF THE COURT.

The appellee while walking along the track of the appellant was overtaken, struck and seriously injured by the train of the latter.

The accident occurred at a point about one and one-half miles south of the limits of the city of Louisville, and on a cattle guard at the intersection of a lane crossing the track at right angles. The appellee had walked on the track for a mile or more, and his objective point was the lane, where he intended to turn off for a neighboring store. He

had nearly reached the lane when the engineer in charge of the train following him discovered his presence on the track, and concluding from the movement of the appellee and the increase of his gait, that he did not intend to quit the track until he reached the lane, the engineer at once gave the usual alarm signals, applied the air brakes and reversed the engine.

This action was induced by the belief—as he testifies—that he was doubtful if the appellee could reach the lane in safety, and as there was no obstruction on either side of the road to prevent his stepping aside, he thought by the signals to induce him to do so, and if not, his slowing up might afford him sufficient time in which to reach the lane. It is shown that the stop made was a remarkably quick one, but not sufficiently so to save the unfortunate traveler, who was caught on the cow-gap, his injuries resulting in the loss of an arm and a leg.

At his suit against the company he was awarded a verdict for \$3,750, and from the judgment thereon this appeal is prosecuted.

On a former appeal—to the Superior Court—the judgment, then for \$2,000, was held not to be sustained by the evidence, and it is now urged that the appellant's motion for a peremptory instruction should have been sustained at the close of the plaintiff's testimony, or at any rate, upon the conclusion of the case.

Looking to this point, we have examined the proof carefully, and it is apparent that upon the question of whether or not the alarm signals were in fact given in time to afford the appellee opportunity to step aside, there is some conflict among the witnesses. The preponderance of the testimony, it may be admitted, sustains the trainmen that the alarm was given when the train was several hundred yards from

the appellee and the lane where the injury occurred; but there is some proof conducing to show that the train, to use the language of a witness, was "right on" the appellee, or within twenty-five yards of him, when the signals were first given.

For the train to run twenty-five yards at the rate it was then going, which was thirty miles per hour, required less than two seconds of time, and whether this was sufficient time for the appellee to have escaped the danger must be left to the jury. The question is, how far was the train from the appellee when the danger signals were first given? Upon the answer to this question depends the determination of the inquiry, were all reasonable means at hand, compatible with the safety of the passengers, used by the engineer to avoid the injury, after the admitted discovery of the plaintiff on the track?

These are the only questions arising under the proof. The law prescribing the duty of trainmen to keep a "look out" for persons on the track is not applicable here, because the engineer saw the plaintiff when 275 or 300 yards from him.

As to the law requiring greater caution on the part of those in charge of trains when running where the road bed is in use by pedestrians as a footway, this has no application here for the same reason. So, too, is it immaterial whether or not the whistle was blown for the crossing at the lane. The rule of the road to blow the whistle for that crossing at a point much further south than where it claims to have sounded the alarms on this occasion is shown by all the employes of the road, and it is in fact established by a preponderance of the proof that they did so on this occasion, but this was for the benefit of those crossing the lane and not for those who were leisurely using the track for travel in preference to a convenient public thoroughfare, as there appears

to have been on either side of the track. In thickly populated vicinities, where many persons are known to be constantly passing about and across the road, as in a large city, the public interest and a due regard for human life require a constant lookout and the giving of appropriate signals, such as blowing the whistle and ringing the bell. No such condition is shown here as in the cases laying down the rule indicated. (See *L. & N. R. Co. v. Schuster*, 10 Ky. L. R. 67; *Paducah &c. R. Co. v. Hoehl*, 12 Bush, 50; *L. & N. R. Co. v. Howard*, 82 Ky., 218.)

But as said before, it is admitted by the company that its agents early discovered the appellee on its track, and his determination to stay there until he reached the lane, and its case is made to rest on its contention that it gave the alarm signals at once and used every available effort to stop the train in time for the appellee to have escaped. It is obvious that upon hearing such signals, the exercise of reasonable care required the appellee instantly to get off the track, not to run to some place that he might choose to get off.

The instructions in this case, twelve in number, submit a variety of issues foreign to the case, the effect of which was necessarily confusing to the jury and in fact misleading.

The first one required the defendant to give timely warning by bell or whistle of the approach of its train to such persons as happened to be on its track in front of its moving train. Of course, when some of the witnesses testified that they did not hear the whistle for the crossing at the lane, the conclusion was easily reached that timely warning of the train's approach had not been given to the appellee, who came within the description of "persons happening to be on the track," and his case was therefore made out.

In another, the negligence of the plaintiff which would defeat a recovery was said to be his knowledge of the approach

of the train and attempt to cross the cattle guard in front of it. If he did not know of it, therefore, it would seem to follow he must recover, but this is not the law. His knowledge is immaterial so far as it affects the company.

The question of the company's duty to keep a "look out," as prescribed in some of the instructions, is eliminated from the case, because of the engineer's admission that he saw the plaintiff and his effort to reach the cattle guard when several hundred yards away.

Resting under the belief which he says he then entertained, it was the duty of the engineer at once to give the danger signal, and stop his train, and the sole issue is, did he do so in time to afford the plaintiff an opportunity to step aside, as a prudent man should have done. The plaintiff testifies that no signals of any kind were given, qualifying the statement, however, by saying that he at least heard none, but every witness in the case proved otherwise. The signals were certainly given. The question is, when?

On the return of the case, the proof should be confined to the issues indicated and the instructions be likewise limited to those issues.

For the reasons indicated the judgment is reversed for further proceedings.

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CASE 18—PETITION EQUITY—MARCH 9.

Proctor v. Bell's Admr.

APPEAL FROM NICHOLAS CIRCUIT COURT.

1. **ENFORCING SATISFACTION OF JUDGMENTS.**—The remedy provided by sec. 439 of the Civil Code and the following sections for enforcing the satisfaction of judgments where there has been a failure to collect by execution must be strictly pursued.

The return of "no property" upon an execution not directed either to the county in which the judgment was rendered, or to the county of the residence of the defendant against whom the judgment is sought to be enforced, will not enable the plaintiff to maintain such an action. The fact that the execution was directed to the county of the residence of some other defendant in the judgment than the one whose property is sought to be subjected will not authorize the action. But if the execution was directed to the county in which the judgment was rendered, the action may be maintained against any of the defendants.

2. **SAME.—LIMITATION.**—The right to maintain an action for the enforcement of a judgment is barred by limitation where fifteen years have elapsed after the issual of one execution before the issual of another. And the fact that proceedings upon a judgment have been suspended by injunction as to some of the defendants does not prevent limitation from running in favor of a defendant as to whom there was no injunction, although he may have been a nominal party to the proceeding.

J. H. POWER AND G. A. CASSIDY FOR APPELLANT.

1. The return of "no property" upon an execution issued to a county other than that of appellant's residence gave appellee no right to maintain an action under sec. 439 of the Civil Code. (Clements v. Waters & Hayden, 11 Ky. Law Rep., 880; Weatherford v. Myers, 2 Duv., 91; Maddox v. Fox, 8 Bush, 402.)
2. As more than fifteen years elapsed after the issual of the first execution before another execution was issued appellee's right of recovery was barred. Sec. 9 of art. 4, chap. 71 Gen. Stats. has no application. (Phillips v. Shipp, 81 Ky., 442.)

JUDGE PAYNTER DELIVERED THE OPINION OF THE COURT.

On the 8th of November, 1872, in the Nicholas Circuit

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Court the appellee recovered a judgment for \$515 against the appellants,, A. W. Proctor, J. N. Proctor, Sr., and J. N. Proctor, Jr. In March, 1873, an execution was issued upon the judgment directed to Fleming county, the then residence of the Proctors.

J. N. Proctor, Sr., and J. N. Proctor, Jr., then instituted an action in the Nicholas Circuit Court alleging that the judgment had been improperly obtained against them, and that a large part of the judgment against them was wrong, as certain items with which they were charged and which went to make up the amount of the judgment were individual debts of A. W. Proctor, and for which they were not liable as his sureties, or at all. An injunction was sued out restraining the collection of the judgment of them. After the pendency of this action until the 26th of September, 1878, an order was entered on that day, by consent of parties, directing that the injunction should be dissolved without damages, and that an execution on the judgment should be issued against M. W. Proctor, administrator of the estate of J. N. Proctor, Sr. (he having died pending the action), to be levied of assets, and against J. N. Proctor, Jr., for the sum of \$289, interest and costs, thus fixing their liability on the judgment at that sum.

No execution save the one directed to Fleming county in 1873 was issued upon the judgment until the 14th day of March, 1890, which also was directed to the sheriff of Fleming county, and upon which that officer made a return in substance, no property found to satisfy the execution.

Upon the judgment obtained in 1872, and the return of "no property found," this action is based, and in which an attachment was obtained against the property of appellant.

Two grounds of defense to the action were relied upon:

First. That appellee could not maintain the action be-

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cause no execution had ever been issued to Nicholas county, the county in which the judgment was rendered, or to Mason county, the county of appellant's residence.

Second. That no execution having been issued upon the judgment from March, 1873, until the 14th day of March, 1890, the right to an action upon the judgment was barred by the statute of limitations.

We are of the opinion that both defenses are good, and we will consider them in the order stated.

Title 10, ch. 4, Civil Code, particularly prescribes the conditions upon which the extraordinary equitable remedy may be applied to enforce the payment of a judgment.

No rule in equity afforded such a remedy as is given by the Civil Code in cases where there is a failure to collect the judgment by an execution. It being a statutory remedy it must be strictly pursued.

Every fact must exist as required thereby before the aid it intended to afford in the collection of a judgment can be invoked.

Under these provisions of the Civil Code the judgment creditor by an equitable action can subject any chose in action, or legal or equitable interest in any property, to the satisfaction of the judgment. To aid in doing this without affidavit or bond he can procure an order of attachment against the property of the defendant by summary proceedings, the court can enforce the surrender of money or securities therefor, or of any other property of the defendant in the execution, which may be discovered in the action, and for such purpose may commit to jail any defendant or garnishee failing or refusing to make such surrender.

When such extraordinary remedies are afforded a judgment creditor, and such vast power is conferred upon the court to enforce it, the law should be strictly followed.

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(Maddox, &c., v. Fox, &c., 8 Bush, 402; Weatherford v. Myers, 2 Duvall, 91; Clements v. Waters & Hayden, 11 Ky. Law Rep., 880.)

The testimony is entirely satisfactory that the appellant lived in Mason county when the execution was directed to Fleming county. The fact that one of the defendants in the execution lived in Fleming county when the execution was directed to and placed in the hands of the sheriff of that county, and by him returned, "no property found," did not authorize the appellee to maintain the action against the appellant. When the execution is not directed to the county in which the judgment was rendered, then it must be to the county of the residence of that defendant against whom it is desired to institute an equitable action as in this case. The fact that there are several defendants, and an execution is directed to the county of the residence of some of them, does not obviate the necessity of having one directed to the county where the judgment is rendered, or to the county of the residence of that one against whom it is proposed to institute proceedings on a return of no property.

It may be said that it will work a hardship upon the party holding the judgment because it may be difficult to learn, or may be uncertain, as to the county in which the defendant resides, but this is not true, because when that is the case the execution can be directed to the county in which the judgment is rendered, and be returned, "no property found," and then the right to maintain the action is complete.

More than fifteen years had elapsed from the date of the issue of the first execution until the next was issued.

It is insisted that appellant obstructed the collection of the judgment by a connivance with J. N. Proctor, Sr., and

J. N. Proctor, Jr., in having the action instituted and the order of injunction issued.

The injunction proceedings never suspended the collection of the judgment so far as the appellant was concerned. The appellant was made a defendant to that action. No relief was sought against him, nor did he file any pleading in the action asking for any relief. He was a nominal and unnecessary party to it.

In the proceedings of J. N. Proctor, Sr., and J. N. Proctor, Jr., against the appellee, a consent judgment was entered fixing their liability in the judgment at \$289, which was an acknowledgement that they were not liable as the appellant's sureties for the entire amount for which judgment was obtained against them.

Although the appellant may have given his sureties the information that they were not liable for the whole amount of the claim which appellee asserted against him, and aided them in proving it, yet as the injunction did not suspend the collection of the judgment as to him, it can not be said that he obstructed the collection of the judgment so as to prevent the running of the statute of limitations pending that litigation.

The statute of limitations barred appellee's right to maintain an action on the judgment, and the clerk should not have issued an execution thereon against appellant.

Judgment reversed with direction to dismiss the petition.

CASE 19—PETITIONS ORDINARY—MARCH 9.

97 103
109 736

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Shields by, &c v. Louisville & Nashville R. Co.

APPEALS FROM SPENCER CIRCUIT COURT.

1. A PUBLIC NUISANCE IS NOT THE SUBJECT OF A SUIT BY A PRIVATE INDIVIDUAL unless he has sustained some special injury thereby. Therefore the unreasonable obstruction of a highway by a railroad train, being a public nuisance, does not give a right of action to a traveler on the highway who has been delayed by the obstruction, unless accompanied by some special damage.
2. OBSTRUCTION OF HIGHWAY BY RAILROAD TRAIN—PROXIMATE CAUSE.—Plaintiffs, mother and daughter, having been delayed by a train of cars across a highway upon which they were driving, the fact that while thus delayed they were frightened by the disorderly conduct of passengers who had left the train and gone upon the highway, does not make the railroad company liable, as the obstruction of the highway was not the proximate cause of the injury, and the company had no power to prevent the disorder. Nor was the obstruction the proximate cause of an injury to one of plaintiffs resulting from her jumping from her buggy, although she claims that the danger of the buggy turning over, to avoid which she jumped, was caused by the darkness coming upon her in consequence of the delay. And no other special damage being claimed a peremptory instruction for defendant was proper.

G. G. GILBERT FOR APPELLANTS

1. The obstruction of the highway was a public nuisance for which the railroad company is subject to indictment. (L. & N. R. Co. v. Commonwealth, 13 Bush, 388; Tennessee R. Co. v. Adams, 3 Head (Tenn.), 596; Pennsylvania R. Co. v. Angel, 38 N. Y., 58.)
2. Mixed nuisances are such as are both public and private in their effect. Of this class are obstructions placed in a highway which produce a special injury to one person by injuring his horse, carriage or himself, while others of the public are only hindered, inconvenienced and delayed. (6 Lawson's Rights, Remedies, &c.,

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sec. 2959 and cases cited; Wood on Nuisances, p. 736 and cases cited.)

3. The plaintiffs suffered such special damage as entitles them to recover. (Corley, &c., v. Lancaster, 5 Ky. Law Rep., 40; Corley, &c., v. Owensboro, &c., R. Co., 10 Bush, 288; Allen v. Olmond, 8 East., 4; Story v. Hammond, 4 Ohio, 374; Williams' Case 5, Rep., 72; Ross v. Miles, 4 Maule. & Sel., 101; Greosley v. Codling, 2 Bing. Rep., 263; Lansing v. Wiswall, 5 Denio., 213; Wilkes v. Hungerford Market Co., 2 Bing., 281; Quincy Canal Co. v. Newcomb, 7 Met. (Mass.), 276; Hughes v. Heiser, 1 Binney, 463; Gates v. Blincoe, &c., 2 Dana, 158; Stone v. Fairbury, &c., R. Co., 68 Ill., 394; Grand Rapids Co. v. Heisel, 38 Mich., 62; Tenery v. Cen. Pac. Ry. Co., 51 Cal., 194; Chicago, &c., Ry. Co. v. Ayers, 106 Ill., 511; Brewer v. Boston, &c., R. Co., 113 Mass., 52; Patterson v. Detroit Ry. Co., 19 Am. and Eng. R. Cases, 415; Murray v. South Carolina R. Co., Rich. (Law), 227.)
4. Plaintiffs are entitled to recover for the fright, for the nervous prostration, for the insulting language heard, &c. (Meagher v. Driscoll, 99 Mass., 281; Detroit Post Co. v. McArthur, 16 Mich., 447; Hawes v. Knowles, 114 Mass., 518.)
5. It is the duty of servants in charge of a railroad train to preserve order, and to protect passengers from the drunken and insulting conduct of others. (Adams v. L. & N. R. Co., 10 Ky. Law Rep., 78; L. & N. R. Co. v. Logan, 10 Ky. L. R., 798.)
And this obligation does not cease the moment the train stops at a railroad crossing.
6. The circumstances of indignity attending the wrong should be considered. (L. & N. R. Co. v. Wilsey, 11 Ky. Law Rep., 420; Tyson v. Booth, 100 Mass., 258; L. & N. R. Co. v. Ballard, 10 Ky. Law Rep., 735; L. & N. R. Co. v. Welsh, 13 Ky. Law Rep., 733; City Transfer Co. v. Robinson, 12 Ky. Law Rep., 555; L. & N. R. Co. v. Grundy, &c., 12 Ky. Law Rep., 293; Pierce on Railroads, 302; 71 Ill., 391; 36 Iowa, 462; 13 Cal., 599; 44 Iowa, 314; 43 Ill., 364; 53 N. Y., 25; 27 Conn., 293; 36 Wis., 658.)
7. The injury sustained from driving home after night is not too remote. (King v. Shanks, 12 B. M., 420; Munford v. Taylor, 2 Met., 600; L. & N. R. Co. v. Wade, 11 Ky. Law Rep., 904; Harrison v. Beckley, 12 B. Mon.; Paducah Lumber Co. v. Paducah Water Co., 11 Ky. Law Rep., 742; s. c. 89 Ky., 340.)

ASHTON P. HARCOURT AND EDWARD W. HINES FOR APPELLEE.

1. If the act of defendant in obstructing the highway was wrongful, it constituted a public nuisance and no individual can maintain a private action for damages on account of it, unless he alleges

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and proves special damage to himself distinct from that suffered by the public. (Selfried v. Hays, 81 Ky., 380; 1 Sutherland on Damages, p. 766.)

2. Mere delay caused by an obstruction is not such special damage as gives a right of action. (Elliott on Roads and Streets, p. 501; 16 Am. & Eng. Enc. of Law, p. 976; Wood on Nuisances, sec. 674; Barr &c., v. Stevens, &c., 1 Bibb, 293; Hirsch v. Wachter, 34 Md., 265; Crook v. Pitcher, 61 Md., 515; San Jose Ranch Co. v. Brooks, 74 Cal., 463; Steamboat Co. v. Railroad, 30 S. C., 539; s. c. 14 Am. St. Rep., 924.)
3. The fright suffered by plaintiff by reason of the disorderly conduct of persons on the highway was not the *proximate* consequence of the obstruction which caused the delay. (Dubuque, &c., Asso. v. Dubuque, 30 Iowa, 176; Sutherland on Damages, vol. 1, p. 49; Sellock v. Lake Shore, &c., R. Co., 58 Mich., 195; Lewis v. Flint, &c., R. Co., 54 Mich., 55; Pittsburg, &c., R. Co. v. Staley, 41 Ohio St., 118.)
4. Even if the fright was the proximate consequence of the obstruction, still the damage was consequential and not direct, and for such damage resulting from a public nuisance there can be no recovery. (Paine v. Patrick, 3 Wood, 289; Steamboat Co. v. Railroad Co. (So. Car.), 14 Am. St. Rep., 925; Barr v. Stevens, 1 Bibb, 293.)
5. The mere fear of injury is not such special damage as will authorize a recovery where special damages must be pleaded. (3 Sutherland on Damages, p. 664.)

Chapman v. Western Union Tel. Co., 90 Ky., 265, distinguished.

JUDGE GRACE DELIVERED THE OPINION OF THE COURT.

These two suits, by mother and infant daughter, arise upon the same state of fact, grow out of the same transaction, and involve the same issues, were heard together in the court below, and may be considered together by this court.

Mrs. Nannie Shields and her daughter Mamie, residents of Spencer county, had on Sunday, the 9th day of July, 1893, been visiting some relatives, and when returning home on that day along a public turnpike road, and not very long before sundown, approached a crossing of the Louisville & Nashville railroad and this turnpike road, at Wakefield, where they found the turnpike obstructed by the passenger

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coaches of defendant corporation, which it seems on this day was running an excursion train for the colored people of Louisville down to Bloomfield, south of the point indicated, and that on returning to Louisville they found a southbound passenger train late, and had side tracked the excursion train to allow the passenger train to go by on the regular track, and it appears from the evidence that in this way these plaintiffs were delayed some thirty minutes, possibly more, by reason of this obstruction. That plaintiff, Mrs. Shields, saw no conductor nor any of the servants of appellee near by. That being so delayed, many of the negro passengers on the excursion train got off same and were wandering about near the station up and down the track and up and down the turnpike where the plaintiff was delayed, cursing, swearing, using obscene, vulgar language, fighting, throwing rocks, one of which came near her and her little daughter in her buggy, a pistol being fired off in the melee, and all this to the terror and alarm and annoyance and insult of herself and little girl.

That after being delayed for quite a while in this way, and under these circumstances for between half an hour and an hour, and just as the sun was setting or a little after, and when the trains passed and this excursion train pulled out off the turnpike, that then plaintiffs proceeding on their way home found a nearer way barred by a locked gate, and being then compelled to go around a greater distance, some two and a half miles to their home, darkness came on them, and the road being rough she became alarmed at the danger of turning over, and jumping from her buggy (the mother) injured her knee, and that then and since the trial it had been inflamed, swollen, and had greatly pained her, and was to some extent stiffened, that by reason of the alarm and fright from the conduct of the negroes at the sta-

tion both she and her little daughter had been made nervous and suffered greatly, the little girl not being able to sleep soundly for some nights. And all this plaintiffs say was by reason of the negligence and wrongful acts of the defendant in obstructing said public passway, and in suffering and permitting the drunken, vicious negroes to go at large on and near its roadway and on and near the turnpike. where she was detained. And all to the great damage of both plaintiff and her little daughter. Wherefore in appropriate separate suits they claim damages.

Defendant after demurring filed its answer, denying that by gross negligence it obstructed the turnpike; denied that it wholly obstructed it at all; denied that its officers abandoned the train or the control or management of same; denied that it had any knowledge of the misconduct of the negro passengers as complained of by plaintiff in any particular; in a second paragraph charging that plaintiffs by their own negligence contributed to any injury they may have sustained; and in a third paragraph charging that this delay and obstruction of the turnpike were rendered necessary by the approach of the south-bound passenger train, and that this was the only place in that vicinity where they could side track their train, and allow the other to pass, and that all this was well known to plaintiff; that they only stopped on the turnpike a short time and for this purpose. Of course defendant denies liability.

A jury having heard the evidence of plaintiff sustaining substantially her petition, the court on motion of defendant gave a peremptory instruction to find for defendant. Exceptions were taken by plaintiff, motion for new trial overruled, and appeal filed.

Defendant corporation by its attorneys in their brief contends that if it did obstruct the turnpike road and travel

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on same that it was a public nuisance, and for which it is subject to indictment, but that the private citizen unless he has sustained special damage other than mere detention can not sue; that any injury he sustained by delay only, being common to all travelers, will not support an action.

And again it says, any possible damage or injury by reason of the misconduct of any of its passengers, while off its train, if such there was, was beyond its control, beyond its authority or duty or power to restrain or prevent. Neither was same or any damage to plaintiffs or either of them the necessary or natural result of such delay or obstruction; or in other words that any negligence of the railroad company in obstructing the turnpike was not the proximate cause of the injury to plaintiff, but that the misconduct of its passengers towards plaintiff caused said injury. Neither was the negligence of defendant the proximate cause of plaintiff, Mrs. Shields', injury on her way home.

Defendant cites numerous authorities along this line, and in support of its contention an early case in Kentucky, being *Barr & Yeiser v. Stevens*, 1 Bibb, 293, in which the court says: "Upon general principles that common interest which belongs equally to all, and in which the parties suing have no special or particular property, will not maintain a suit. Thus a public nuisance is not the subject of a suit by a private individual unless he has sustained some special injury thereby. As if a man fell trees in a highway whereby it is stopped up to the annoyance of the passengers, it is a nuisance common to all, a public nuisance, for which at common law he might be prosecuted by the Commonwealth and punished, but a suit against him could not be maintained by a private individual who had only sustained the injury common to all of being turned out of the way, but that if in attempting to ride over the trees felled in the road an individ-

ual's horse should be thrown whereby himself or his horse is wounded, he can maintain an action for this special damage. The reason why he can not without special damage maintain his suit for the nuisance against the wrongdoer is, that if one could sue, all might, and this would be ruinous."

This doctrine, thus clearly and early announced, seems to have been kept steadily in view in Kentucky, and the following case may be cited in support or recognition of same: *Seifried v. Hays*, 81 Ky., 380, a slaughter-house case, in which damages were allowed only to those showing special damage.

Sutherland on Damages, Vol. 1, page 766, maintains the same general principle.

Elliott on Roads and Streets, page 501, says mere delay caused by an obstruction, unaccompanied by any special damage or injury, does not as a rule give any right to an action for special damage.

And in *16 American and English Encyclopedia of Law*, page 976, it is said that for mere delay in a journey, or from being compelled to take a circuitous route, by reason of an obstruction in a river or a road, it would seem from the weight of authority that a cause of action does not arise.

Wood on Nuisances, sec. 674, is cited to the same effect.

On the other question, as to whether any injury to the feelings or by reason of any alarm or fear excited in either of the plaintiffs by reason of the misconduct of the negro passengers, was so connected with any negligence in defendant in obstructing the turnpike way, as that it may be fairly said to be the proximate cause of same and so to hold defendant liable, we find the general doctrine on this subject announced (*16 American and English Encyclopedia of Law*, page 428), to be that "it is a maxim that the law looks at the proximate and not at the remote cause of an

injury, and that out of the application of this maxim grows the liability or nonliability of a defendant charged with the infliction of an injury by his negligence, and unless the alleged negligence of the defendant was the proximate cause of the injury of which plaintiff complains there can be no recovery. For consequences of which his act or omission was only a mere condition or remote cause, the defendant is not liable." The same work also recites, page 431, that there is no fixed, unbending rule that in every case will clearly distinguish proximate and remote causes, and discriminate between active, efficient causes and apparent causes that are merely conditions and not causes of the injuries that follow. That "it follows that, to constitute actionable negligence, there must be not only a causal connection between the negligence complained of and the injury suffered, but the connection must be by a *natural and unbroken sequence*—without intervening efficient causes—so that but for the negligence of the defendant the injury would not have occurred;" that "it must not only be a cause but the *proximate*, that is, the direct and immediate efficient cause of the injury."

In *Louisiana Mut. Ins. Co. v. Tweed*, 7 Wall. (74 U. S.), 44, Justice Miller said: "We have cited to us a general review of the doctrine of the proximate and remote causes as it has arisen and been decided in the courts in a great variety of cases. It would be an unprofitable labor to enter into an examination of these cases. If we could deduce from them the best possible expression of the rule it would remain after all, to decide each case largely upon the special facts belonging to it, and often upon the very nicest discriminations." So that after all we can but return to the facts of this case, and say whether any negligence of the defendant in obstructing this passway at the time and place was the proximate cause of any alarm, fright

or injury arising or growing out of the misconduct of the passengers on said railway train at the time.

This obstructing train was but a thing, an inanimate thing, a physical fact or force, or power, barring the passing of plaintiff. It was not a person, not a thing of life. The injury of which plaintiff complains was committed by persons, free moral agents, sentient beings, yet drunk as charged, and offending the moral feelings of plaintiff by blasphemy and card playing, and affrighting her by fighting, throwing rocks, and firing pistols. How can it be said that the railway train was doing any or either of these things? It is not claimed that defendant's agents were employed in or participating in these wrongful acts.

It should further be considered that these officers of the railway train were not civil officers; they had no right or power to arrest or imprison, or determine the guilt or innocence of any particular individual, nor to inflict punishment on the guilty if identified. Why then should it be said that they did themselves the things complained of, or that they suffered and permitted them to be done to the injury of the plaintiffs, or so as to hold the railway company liable to plaintiffs for any damages sustained thereby?

We recognize the fact that in certain limited cases these railway officers have a certain limited power or authority in the protection of the property of their employers, and in protecting from injury, violence or annoyance, the passengers on their trains, under their immediate custody and control, but beyond this we know of no such authority or power. If plaintiff's moral sensibilities were outraged, or if she was put in fear by the wrongful acts of others, her remedy is against those who injured her and not against the railway company. As to the injury sustained by plaintiff, Mrs. Shields, by jumping out of her buggy, this is still further

removed from any possible connection with the negligence of defendant in obstructing the passway.

This negligence was not the proximate cause of either injury complained of.

This was doubtless the view taken by the judge below in dismissing the petitions of plaintiffs.

The judgment is affirmed.

CASE 20—PETITION ORDINARY—MARCH 12.

Chesapeake, &c R. Co. v. Osborne.

APPEAL FROM GREENUP CIRCUIT COURT.

1. RAILROADS—EJECTION OF PASSENGER FROM EXCURSION TRAIN.—Where one who had bought a ticket for a certain point on a railroad attempted soon after to get upon an excursion train which stopped at the station, and was forcibly ejected, the railroad company can not escape liability upon the ground that it had placed its cars and train-hands under the control of another for the purposes of the excursion, and that the person ejected had no right to ride upon that train. Public policy and the law alike forbid that a railway company should be allowed to place its road, cars and train-hands under the control of a stranger for such a purpose, and thus evade liability for the wrongs done by such person.
2. EXCESSIVE VERDICT.—A verdict for \$1,000 for the ejection of a passenger from a railroad train is not, under the circumstances of this case, so excessive as to show that it was the result of passion or prejudice.

WADSWORTH & COCHRAN FOR APPELLANT.

1. As no attack was made upon appellee's character, it was not competent for him to introduce evidence as to his good standing in the community in which he lived.
2. Steward was not the agent of appellant and it was not responsible for his acts.
3. The court erred in refusing to instruct the jury, as asked by appellant, that the person ejecting appellee had the right to use only such force as *reasonably appeared to be necessary* to eject him.
4. The amount of damages assessed was flagrantly excessive.

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Chesapeake, &c R. Co, v. Osborne.

THOMAS H. PAYNTER FOR APPELLEE.

1. Defendant is liable for the acts of Steward. It can not escape the consequences of his wrongful conduct by claiming he was not in its employ. (Winnegar's Adm'r v. Central Passenger R. Co., 85 Ky., 547; s. c. 34 Am. & Eng. R. Cases, p. 465; Bower v. B. & S. W. R. Co., 42 Iowa, 546; Wood on Railway Law, vol. 3, p. 1442, sec. 366; Railroad Co. v. Brown, 17 Wall., 445; Williams v. Pullman Palace Car Co., &c., 33 Am. & Eng. Railway Cases; Thorpe v. Railway Co., 76 N. Y., 402; Flick v. C. & N. W. R. Co., 34 Am. & Eng. R. Cases.)
2. Appellee was not a trespasser, but even had he been he would have been entitled to recover. (Carter v. Louisville, &c., R. Co., 22 Am. & Eng. R. Cases, 360; s. c. 99 Ind., 552; Louisville, &c., R. Co. v. Sullivan, 81 Ky., 63; Kline v. C. P. R. Co., 37 Cal., 400.)
3. The facts alleged and proved do not constitute a leasing by defendant of its road or train, but even if they could be so regarded, defendant would still be liable, as railroad companies can not lease their lines so as to relieve themselves from liability for the negligence and torts of the lessee without legislative authority to lease and to exempt from such liability. (Pierce on American Railroad Law, 244; International & Great Northern R. Co. v. Moody, 35 Am. & Eng. R. Cases; Balsley v. St. Louis, &c., R. Co., 35 Am. & Eng. R. Cases.)
4. A verdict can not be set aside as excessive, unless it is so glaringly excessive as to appear "at first blush" to have resulted from passion or prejudice. (L. & N. R. Co. v. Mitchell, 87 Ky., 337; L. & N. R. Co. v. Ballard, 88 Ky.)

JUDGE GUFFY. DELIVERED THE OPINION OF THE COURT.

This is an appeal taken from a judgment of the Greenup Circuit Court rendered in the action of David Osborne against the appellant, Chesapeake & Ohio Railway Company. It appears that appellee some time prior to 11th of July, 1891, bought of the ticket agent of appellant, at Russell, Kentucky, a ticket to Ashland, and that soon afterwards a train of cars reached Russell, and appellant with the ticket stuck in his hat boarded the cars, or at least got upon the steps, and was by one Steward ejected from the car by force, and as appellee claims while the car was in motion, and that

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he was thereby injured, mortified and humiliated; and to recover damages for the injuries instituted suit in said court. A trial resulted in a verdict and judgment in favor of plaintiff for \$1,000. Appellant filed grounds and moved the court for new trial, which motion was overruled, and the defendant has appealed.

The defendant in the court below denied its liability for the injury, if any was sustained. The substance of the answer was that it had let I. W. Steward have the train and train-hands, including the conductor, for the purpose of running an excursion train to Kanawha Falls, and that the appellant was in no wise responsible for the acts of Steward, and that appellee had no right to ride on that train..

Public policy and the law alike forbid that a railway company shall be allowed to place its road, train-hands, and cars in the hands of, or under the control of, a stranger for such purpose as is claimed in this action, and thus evade liability for the wrongs done by such person.

Appellant sets out a number of grounds for new trial, nine in all. Inasmuch as defendant finally procured the attendance of the principal witness whose testimony was so much desired, the refusal of the court to continue the case did not interfere with the substantial rights of the defendant. The admission of the testimony of Carner and Hill, although erroneous, did not affect, as we think, the substantial rights of the defendant, especially as the same was afterwards withdrawn.

Instructions 1 and 2 given by the court were as favorable to defendant as it was entitled to, and the same may be said as to instructions 3 and 4. Instructions 5, 6, 7 and 8 are not in this record, and under the well-known rule of law they must be held to have been properly refused. It does

not appear that the verdict is so excessive as to show that it was the result of passion or prejudice. The other grounds need not be further noticed. It seems to us that the instructions taken altogether were not prejudicial to the substantial rights of defendant. All the issues of fact involved in this case were under proper instructions submitted to the jury, and the jury, being the judges as to the facts proven and the credibility of the witnesses, found for the plaintiff, and we do not feel authorized to disturb the verdict so found.

Judgment affirmed.

Judge Paynter not sitting.

Johnson v. Hicks' Guardian.

CASE 21—PETITION EQUITY—MARCH 13.

Johnson v. Hicks' Guardian.

APPEAL FROM HENDERSON CIRCUIT COURT.

DEBT DUE BY GUARDIAN TO WARD—LIABILITY OF SURETIES.—Where one who is solvent qualifies as administrator of the estate of his creditor, or as the guardian of infants to whom he is indebted, the amount of the debt must be treated as cash assets coming to his hands for the proper disposition of which the sureties in his bond are liable. And the fact that one of several sureties in the bond is surety in the note by which the debt is evidenced, does not make that surety liable for the entire debt as between him and the other sureties.

S. B. & R. D. VANCE FOR APPELLANT.

There is no fact in the case tending to show an intention by Hatchett to transfer to his account as guardian the debt evidenced by the note in which appellee was surety. And as it appears that the guardian was solvent and judgment had not been rendered against him, it was error to hold that he had become liable for the amount of the note as guardian and to render judgment therefor against appellant as one of the sureties in his bond. (*Bush v. Bush*, 2 Duv., 269.)

JNO. L. DORSEY OF COUNSEL ON SAME SIDE.**YEAMAN & LOCKETT FOR APPELLEE.**

It standsadmitted by the pleadings that Wm. Hatchett, upon his qualification as guardian, charged himself as such with the amount of his note to the antecedent guardian. But whether that is so or not the note was merged in his responsibility as guardian, and the sureties in his bond are responsible, just as if it had been so much money turned over to him by the antecedent guardian. (*Karr's Adm'r v. Karr*, 6 Dana, 6; *Bush v. Bush*, 2 Duv., 74; *Hickman v. Kamp*, 3 Bush, 206.)

JUDGE PAYNTER DELIVERED THE OPINION OF THE COURT.

It appears that James T. Hicks was the guardian of Wirt

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Hicks and Baxter Hicks. While acting as such guardian he loaned to Wm. Hatchett some money belonging to his wards, for the balance of which Hatchett executed his note for \$953.68, with the appellee, John T. Hatchett, as his surety. After the maturity of the note and before it was paid, James T. Hicks died. Wm. Hatchett became the administrator of the estate, and also qualified as the guardian of Wirt and Baxter Hicks. On Wm. Hatchett's bond as guardian, the appellee John T. Hatchett and the appellant A. S. Johnson became his sureties.

Wm. Hatchett was removed as guardian, and the Ohio Valley Banking and Trust Company was appointed guardian of Wirt and Baxter Hicks. The former guardian, Hatchett, failing to pay the guardian the amount for which he was liable to his late wards, these actions were brought against his sureties, Johnson and Hatchett. The court rendered judgment against them for the amounts due each ward.

The appellant by an appropriate pleading denied his liability for any part of the amount for which the actions were brought, and insisted that his co-surety, John T. Hatchett, being solvent and liable as surety on the note which Wm. Hatchett had executed to Hicks, guardian, that in the event the present guardian should be permitted to recover of him, then he should be allowed to recover against John T. Hatchett such amount as he was compelled to pay in consequence of his liability on the bond of Wm. Hatchett as guardian. On the other hand it is contended that Wm. Hatchett charged himself as guardian with the amount of the note which he owed the former guardian of his wards, or if he did not formally do so, being solvent when he qualified as their guardian, in law he was charged therewith, and it should be treated as cash assets in his hands.

Johnson v. Hicks' Guardian.

The testimony conduces to show that James T. Hicks commenced but failed to complete a settlement of his accounts as guardian with the county judge; that afterwards Hatchett as guardian completed the settlement which Hicks began, in which it appears that the assets in the hands of the guardian are treated as cash. Wm. Hatchett testifies that he held the note as so much money in his hands belonging to his wards, but it does not appear that he made any charge in any book to that effect; in fact it does not appear that he kept any book containing an account as guardian. John Hatchett testifies that Wm. Hatchett soon after he qualified as guardian gave him to understand that the note came to his hands as so much cash. He never turned the note over to the present guardian.

From the foregoing facts it must be concluded that Wm. Hatchett in effect charged himself as guardian with the amount of his note, and his sureties in the bond which he executed as guardian are liable to his wards therefor.

Even if nothing had been done by the guardian indicating a purpose to charge himself with the amount of his note, he was in law charged therewith, as he was solvent when he qualified as guardian.

When a debtor who is solvent qualifies as the administrator of the estate of his creditor or as the guardian of infants, the amount which he owes such estate must be treated as cash assets coming to his hands, for the proper disposition of what his sureties in his bond are liable. (*Karr's Admr. v. Karr*, 6 Dana, 6; *Hickman v. Kamp's Admr.*, 3 Bush 206.)

The fact that John T. Hatchett was his surety on the note does not change the law which should be applied to this case. When Wm. Hatchett qualified as guardian and got possession of the note, the right to an action was suspended

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thereon, as it could not be expected that he as guardian would sue himself thereon. The surety on the note had his position altered, as he could not obtain the relief which the statute would have given him before Wm. Hatchett became the guardian, in this, that he could not give a notice requiring the holder of the note to sue, thus relieving himself of liability in the event of a failure of the holder of the note to sue.

We think Wm. Hatchett being solvent when he qualified as guardian of the Hicks children, his sureties became liable on the bond for the amount of the note which he owed the former guardian.

It follows from the views expressed that the appellant was not entitled to recover of appellee John T. Hatchett.

Judgment affirmed.

CASE 22—PETITION ORDINARY—MARCH 14.

Farson, Leach & Co. v. Board of Commis-
sioners of Sinking Fund of City of
Louisville.

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112	250
97	119
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APPEAL FROM JEFFERSON CIRCUIT COURT, COMMON PLEAS DIVISION.

1. MUNICIPAL CORPORATIONS—LIMITATION OF INDEBTEDNESS.—When bonds are issued by a city for the express purpose of retiring or taking the place of other outstanding bonds of the city, the amount represented by them is not to be considered as an increase of the city's indebtedness in estimating the amount of indebtedness which it may incur under the limit fixed by sec. 158 of the constitution.
2. SAME.—Even if the indebtedness represented by the bonds in question here had in fact increased the aggregate indebtedness of the

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city to an amount in excess of the constitutional limit, yet the fact that it was authorized under an act passed prior to the adoption of the constitution would protect it under a proviso of sec. 158 of the constitution, to the effect that an indebtedness in excess of the limit fixed may be contracted "when the same has been authorized under laws in force prior to the adoption of the constitution."

3. **SAME—REPEAL OF STATUTE.**—The act of May 22, 1890, by which the mayor of the city of Louisville was directed to cause to be issued bonds of the city to a certain amount for the purpose of calling in certain bonds theretofore issued, was not repealed by sec. 3010 of the Kentucky Statutes.
4. **A CITY MAY MAKE ITS BONDS PAYABLE IN GOLD**, although the act authorizing them to be issued is entirely silent upon that subject. There is embraced by every such grant of power not only the powers conferred in express words, but those fairly implied in, or incident to, the powers expressly granted.

M. S. BARKER FOR APPELLANT.

My clients are anxious to take the bonds when it shall have been judicially determined that they are legal. The question as to their validity is submitted to the court. (Const. of Ky., sec. 158; Ky. Stats., sec. 3010; *Aydelott v. South Louisville*, 16 Ky. Law Rep., 166.)

H. S. BARKER FOR APPELLEES.

1. The act of 1894 (Session Acts, 1894, p. 18) does not repeal act of 1890.
Repeals by implication are not favored. (Endlich on Int. of Statutes, sec. 210; *Commonwealth v. Mason*, 82 Ky., 256; *Commonwealth v. Weller*, 14 Bush, 218.)
A general statute does not repeal a special statute by implication. (Endlich on Int. of Statutes, sec. 223.)
2. The city was authorized to make the bonds payable in gold. (*Judson & Co. v. City of Bessemer*, 29 English and American Corporation Cases, p. 5; *Ashley v. Board of Supervisors*, 60 Fed. Rep., 55; *Moore v. City of Walla Walla*, 60 Fed. Rep., 961.)
3. There is nothing in the constitutional objections, as the right to refund the bonds of cities is specially provided for in sec. 158 of the constitution.

JUDGE EASTIN DELIVERED THE OPINION OF THE COURT.

By the provisions of an act of the legislature of Ken-

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tucky, approved March 30, 1880, the commissioners of the sinking fund of the city of Louisville, appellees herein, were charged with the payment of the floating indebtedness of that city existing on the 1st day of January, 1879, and, for the purpose of paying same, the general council of said city was authorized and directed to cause to be issued and turned over to said commissioners, for sale, the coupon bonds of said city to the amount of one million dollars, bearing interest at the rate of five per cent. per annum, one-half of said bonds to be so issued that they might be called in and paid off at any time after ten years from their date, and the other half, at any time after twenty years from their date.

Under an ordinance passed by the general council of said city in pursuance of said act, bonds of the city to the amount above named, bearing date May 1, 1880, and conforming to the provisions of said ordinance and said act, were issued and delivered to appellees for the purpose above mentioned, and were sold by them.

For the purpose of enabling appellees to call in and pay off the one-half of the bonds so issued which were made payable at the expiration of ten years from their date, the legislature of Kentucky passed another act, which was approved May 22, 1890, whereby the mayor of the city of Louisville was authorized and directed to cause to be issued other bonds of said city to the amount of five hundred thousand dollars, payable twenty years after date, and bearing interest at the rate of four per cent. per annum, and to deliver said bonds, when issued, to the appellees, to be by them sold at the best price obtainable, but not at less than par, and to apply the proceeds thereof, when sold, to the payment of the bonds issued under said act of March 30, 1880, or to exchange them, in whole or in part, for the bonds issued un-

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der this last mentioned act, if terms of exchange could be agreed upon.

The bonds authorized by the act of May 22, 1890, amounting to the sum of five hundred thousand dollars, were accordingly issued in conformity with said act, and were delivered to appellees, who subsequently offered the same for sale, and on November 7, 1894, received a proposition in writing from appellants, offering to purchase the entire issue of bonds at par, which proposition was, on the same day, accepted in writing by appellees.

Under said contract of sale, the bonds were tendered to appellants, and payment therefor was demanded by appellees, but refused, and suit having been brought to enforce the performance of said contract, the lower court adjudged that the same be enforced, and from that judgment this appeal is prosecuted.

The grounds upon which appellants base their refusal to comply with their offer are, as we understand from the answer filed by them in the court below, as follows, to-wit:

1st. That, as the act of May 22, 1890, under which these bonds were issued, was not acted upon, and as none of said bonds were sold, until after the adoption of the present State constitution, which went into effect on September 28, 1891, and some of the provisions of which are supposed to forbid the issuing of these bonds, therefore they are void as being issued in violation of the State constitution.

2d. That this act of May 22, 1890, was repealed by the general act subsequently passed with reference to the sinking fund of the city of Louisville, and found under the head, "Sinking Fund" at page 1023, and being sec. 3010, of the Kentucky Statutes, and

3d. That there was no authority in the mayor or in ap-

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pellees to make these bonds payable in gold, and that both principal and interest thereof being made payable in gold coin of the United States, they are, for that reason, void.

Briefly considering these objections in their order, we need only say that we can not agree with appellants in their contention that the issuing of these bonds is violative of any provision of the constitution of this State.

The argument for appellants on this branch of the case is based largely upon the assumption that the creation of this indebtedness of five hundred thousand dollars, by the issue of bonds to that amount, would increase the aggregate indebtedness of the city of Louisville to an amount in excess of the constitutional limit of ten per centum of the assessed value of the taxable property therein, as fixed by sec. 158 of the constitution, for cities of the first class, to which the city of Louisville belongs.

In reply to this argument, it is only necessary to call attention to the fact that the certificates of the officials of the city of Louisville in charge of these departments, viz.: of the secretary and treasurer of the sinking fund, of the city comptroller and of the city assessor, purporting to give the respective amounts of the bonded indebtedness, the floating indebtedness and the assessed value of the taxable property in said city as of the date on which this contract for the sale of these bonds was made, all of which certificates were filed and are to be considered in evidence in this case, conclusively show that, even if the indebtedness represented by the bonds here in issue were to be considered as an additional item of indebtedness, still this would not make an aggregate indebtedness nearly equal to ten per centum of the assessed value of the taxable property in said city.

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This argument must, therefore, fail because it is based on a mistaken assumption of fact.

But, even if this were not so, it seems to us that as these bonds are expressly issued for the purpose of retiring or taking the place of other outstanding bonds of said city, the amount represented by them is not to be considered as an increase of the city's indebtedness. in estimating the amount of indebtedness which it may incur under the constitutional limit above referred to, but that it is expressly excluded from such calculation by the closing sentence of said sec. 158 of the constitution, which is in these words, to-wit: "Nothing herein shall prevent the issue of renewal bonds, or bonds to fund the floating indebtedness of any city, town, county, taxing district or other municipality."

And furthermore, even if the indebtedness represented by these bonds had in fact increased the aggregate indebtedness of said city to an amount in excess of the constitutional limit of ten per centum of the assessed value of the taxable property therein, yet the fact that it was authorized under the act of May 22, 1890, passed prior to the adoption of the constitution, would seem to protect it, under the language of another clause in said sec. 158 of the constitution, which is in these words, to-wit: "Provided, any city, town, county, taxing district or other municipality may contract an indebtedness in excess of such limitations (ten per centum of the assessed value of taxable property in this case), when the same has been authorized under laws in force prior to the adoption of this constitution."

A question very similar to this was recently considered by this court in the case of Aydelott v. South Louisville, reported in 16 Ky., Law Rep. 166, in which the validity of

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certain bonds of South Louisville, issued subsequently to the adoption of the present constitution, under an act of the legislature passed prior to the adoption of the constitution, was questioned upon the same grounds urged here, and in that case the bonds were held valid and unaffected by the provisions of the constitution. We refer to that case, without quoting from the opinion, as settling the question now under consideration here.

In the next place, as to the contention of appellants that this act of May 22, 1890, under which these bonds were issued, was repealed by sec. 3010 Kentucky Statutes, it is sufficient to say that, not only is there nothing in this general act, found in sec. 3010, inconsistent with the provisions of the act of May 22, 1890, but the very first clause of said sec. 3010 is in these words, to-wit: "The sinking fund to pay the bonded debt of the city is hereby continued as now established by law."

There was, therefore, no repeal of this special act by sec. 3010, Kentucky Statutes.

The only other ground upon which it is claimed that these bonds are invalid is based upon the fact that they are made payable, both principal and interest, in gold coin of the United States, while there is nothing said in the act authorizing their issue, as to the kind of currency or money in which they are to be made payable.

The precise question here raised was passed upon by the Supreme Court of Alabama, and that court, in its opinion sustaining the power of the city to make its bonds payable in gold, although the act authorizing them was entirely silent on the subject, uses this language, to-wit:

"Express and general power to issue negotiable bonds, in the absence of legislative restriction, carries the implied

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or incidental power to make them payable generally; that is, in currency which is constitutionally a legal tender, or payable in the particular coin which constitutes the legal and commercial standard by which the value of other kinds of currency is measured." (Judson v. City of Bessemer, 87 Ala. 240.)

See also Ashley v. Board of Supervisors, etc., 60 Fed. Rep. 55, and Moore v. City of Walla Walla, 60 Fed. Rep. 961.

It seems to us that in every grant of power of this kind, the legislature may be presumed to have left something to the discretion of the grantee of the power where the exercise of discretion would necessarily or naturally be incidental to a full and complete execution of the power in all its details. In other words, there is contemplated in and embraced by every such grant not only the powers conferred in express words, but those fairly implied in or incident to the powers expressly granted. In determining the extent of the power, therefore, some regard should be had to the object of the grant.

As said in the case of Smith v. City of Newbern, 70 N. C. 14, in discussing the powers of municipal corporations under legislative grants: "If we say they can do nothing for which a warrant could not be found in the language of their charter, we deny them, in many cases, the power of self-preservation, as well as many of the means necessary to effect the essential object of their creation; hence they may exercise all the powers within the fair intent and purpose of their creation which are reasonably necessary to give effect to powers expressly granted, and in doing this they must have the choice of means adapted to ends, and are not confined to any one mode of operation."

Looking now at the powers granted in the case before us,

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and the objects and purposes of the same, we find that they were among other things, and mainly, to issue its negotiable securities, running over a period of twenty years, for the purpose of borrowing money by the sale thereof at their face value and carrying a low rate of interest. These bonds are to be offered on a market in which there is current more than one circulating medium, but one which is regarded more stable and less subject to fluctuations than any other, which is the recognized standard of value, and which is the equivalent of and corresponds in value with that which the borrower is to receive for its bonds. Can there be any legal reason why the borrower, in case it should seem, in the exercise of a sound discretion, both prudent and advantageous to stipulate for the payment of the loan in that particular medium of circulation, so that the exact measure of the contract—what is to be paid by the borrower on the one hand and what is to be received by the lender on the other—maybe fixed and understood by both contracting parties, should not be allowed to so contract? It seems not to us; and it further seems to us that this is purely a matter of contract which should be and is entrusted to the discretion of the borrower, who is thus authorized to go into the open market to negotiate the desired loan, and who might, under some circumstances, be seriously embarrassed, or possibly rendered wholly unable to negotiate his securities. if denied this privilege of contracting as to these details as an individual might do. We therefore see no valid objection to these bonds by reason of their having been made payable in gold, and the judgment of the lower court is affirmed.

Cincinnati, &c. R. Co. v. Louisville & Nashville R. Co.

CASE 23—PETITION ORDINARY—MARCH 15.

Cincinnati, &c R. Co. v. Louisville &
Nashville R. Co.

APPEAL FROM BOYLE CIRCUIT COURT.

1. **JOINT WRONGDOERS — RIGHT OF ONE TO INDEMNITY FROM THE OTHER.**—Where passengers on the cars operated by one railroad company are injured by a collision with the cars of another company at a crossing of the two roads, and the former company is compelled to pay damages to its passengers for the injuries they have sustained, it can not look to the latter company for indemnity upon an allegation that the injuries were caused "wholly" by the negligence of the latter company. Failing to allege facts showing it was in fact liable as between it and its passengers, it will be regarded as one who has compensated the passengers for a wrong done them by another and then seeks to be substituted to their rights, which can not be done.
2. **SAME.**—Even though the carrier which has been compelled to respond in damages to its passengers was in fact liable, still it can not look to the other carrier for indemnity or contribution, unless it shows it was not an actual participant in the commission of the injury. If both companies were actual participants in the wrong, they will be regarded as *in pari delicto* without regard to the relative degrees of their neglect, and the one which has been compelled to pay is not entitled to indemnity or contribution from the other. The cases in which wrongdoers are held as not being *in pari delicto* are where the one asking for indemnity was not an actual participant in the wrong, but his liability arose by reason of the negligent act of some one acting under his authority, from whom he seeks indemnity.
3. **PASSENGER CARRIERS.**—It is the duty of a railroad company to exercise the utmost degree of human care, diligence and skill in order to carry its passengers safely. But it is not an insurer of the life or person of the passenger, and can only be made liable on the ground it has failed to exercise this extraordinary care and diligence for his safety.
4. **RIGHT OF ACTION FOR INJURY TO CARS.**—If the company seeking indemnity in this case were seeking to recover for the injury to its cars the fact that the injury was caused "wholly" by the negligence of defendant would be sufficient to entitle it to recover.

Cincinnati, &c. R. Co. v. Louisville & Nashville R. Co.

EDWARD COLSTON, C. B. SIMRALL AND GEORGE HOADLEY.
JR., FOR APPELLANT.

1. When the plaintiff said that the accident in question was caused wholly by the negligence of the defendant, it did not say that it was free from that degree of fault that might make it liable to its passengers, but only that it was not negligent to the extent that would prevent its recovering against defendant. (L. & N. R. Co. v. E., T., V. & G. R. Co., 60 Fed. Rep., 995.)
2. It will be claimed that if plaintiff was in the exercise of ordinary care so that defendant might be made liable to it for this accident, then the plaintiff was not liable to its passengers for the injuries suffered by them, and its payments to them were unnecessary and not the result of plaintiff's negligence. This assumes that the measure of plaintiff's duty to its passengers was to exercise ordinary care for their safe transportation. Such is not the law, however. (Kellon v. Central Iowa R. Co., 23 N. W. Rep., 740; L. & N. R. Co. v. E., T., V. & G. R. Co., 60 Fed. Rep., 995; L. & N. R. Co. v. Ritter's Adm'r, 85 Ky., 370.)
3. Where the parties are not *in pari delicto*, but one of them has been made liable to a stranger by the fault of the other, he may recover against that other what he has been forced to pay to the stranger by his fault. (Lowell v. Boston & Lowell R. Co., 23 Pick., 24; Gray v. Boston Gas Light Co., 114 Mass., 149; Churchill v. Holt, 127 Mass., 165; Chicago v. Robbins, 2 Black, 418; Brooklyn v. Brooklyn City R. Co., 47 N. Y., 475; Campbell v. Somerville, 114 Mass., 334; Minneapolis Mill Co. v. Wheeler, 31 Minn., 121; Boston v. Worthington, 10 Gray, 496.)
4. The action is not barred by limitation. The injury to plaintiff is quite distinct from that to its passengers, and the limitation of one year does not apply.

JOHN W. YERKES OF COUNSEL ON SAME SIDE.

R. P. JACOBS FOR APPELLEE.

1. The allegation of negligence without further statement of facts as to the duty of appellee and the facts constituting the negligence is not sufficient. (9 Bush, 527.)
2. The carrier of passengers is not, as in the case of carriers of goods, an insurer of absolute safety. (2 Duv., 556; Shearman & Redfield on Negligence, sec. 265; Beach on Contributory Negligence, 2 ed., sec. 144.)
3. If appellant was guilty of contributory negligence, it had no cause
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- of action against appellee. If it was not guilty of negligence that contributed to the injury, it was under no liability to the passengers injured, and its payments to the passengers were purely voluntary. (Shearman & Redfield on Negligence, sec. 265.)
4. The payments to the passengers being purely voluntary, and there being no assignment from the passengers of their claims, if any, appellant had no cause of action against appellee. (3 Bibb, 529; 3 Litt., 426; 10 B. M., 315.)
 5. Appellee, if liable at all, is liable for a tort, and appellant's right of action is barred by limitation. (Gen. Stats., chap. 71, art. 3, sec. 3.)

H. W. BRUCE AND JNO. McCHORD OF COUNSEL ON SAME SIDE.

CHIEF JUSTICE PRYOR DELIVERED THE OPINION OF THE COURT.

This action was instituted in the Boyle Circuit Court by the Cincinnati, New Orleans & Texas Pacific Railway Company against the Louisville & Nashville Railroad Company upon the following state of facts:

The plaintiff in operating its railroad extending from Cincinnati, Ohio, to Chattanooga, Tenn., as a carrier of passengers and freight, had to cross certain railroad tracks of the defendant at Junction City, in the county of Boyle, and the manner as well as the time of crossing was known to the defendant or its agents in charge of the operation of its trains at that place.

That in November of the year 1890, with a passenger train of the plaintiff operated in the customary way when crossing the defendant's track at Junction City, the defendant through the gross negligence of its agents in charge of defendant's train on the road of defendant caused the engine and train on defendant's road to run into the train of the plaintiff and break and destroy its cars.

That at the time the plaintiff had in its cars numerous passengers (naming them), under a contract of safe carriage between certain terminal points on its road. These passen-

gers were in the car that was demolished, and each and all of them received severe bodily injuries by reason of the collision, and that by reason of its obligation to carry them safely the plaintiff became liable to, and was compelled to pay and did pay to, said persons so injured divers sums of money (naming the amounts) making in all the sum of \$2,827.67.

The plaintiff, after reciting these facts, the substance of which is given, made the following averments in his petition: "Plaintiff says that said injuries to said passengers for which it became liable, and for which plaintiff was compelled to pay and did pay said sums, *was occasioned wholly* by the negligence of the defendant in running its engine into plaintiff's train, and thereby injuring said passengers who were being carried on plaintiff's train in the way and manner stated.

"Plaintiff says the loss sustained by it in the payment of said sum of \$2,827.67 to said persons aforesaid *was occasioned wholly* by the negligence of the defendant in running its said engine into the train of this plaintiff as aforesaid, and in injuring the plaintiff's passengers as aforesaid."

Judgment is then asked for the amount paid in damages, etc. A general demurrer was sustained to the petition, the court below holding the facts alleged presented no cause of action.

The questions arising on the demurrer are interesting as well as important, and if the averments of the petition presented such facts as the argument of counsel for the appellant contended this court must assume existed, there would be much reason for holding the appellant entitled to recover. The claim of the appellant and the right of recovery is based solely upon the alleged negligence of the appellee, not for an injury to the property of the latter but for an injury to

the persons of its passengers, with whom the appellant had contracted to carry safely from one point of its road to another.

It was the duty of the appellant, as held by this court in the case of L. & N. R. Co., v. Ritter's Adm'r, 85 Ky., 368, to exercise the utmost degree of human care, diligence and skill in order to carry its passengers safely, and while recognizing this as the well-settled rule on the subject, the carrier is not an insurer of the life or person of the passenger, and can only be made liable on the ground that it has failed to exercise this extraordinary care and diligence for his safety. If, therefore, this is a case where the one company has been compelled to pay damages to its passenger by reason of an injury to him caused by the negligence of another company, and for that reason is seeking indemnity, the neglect of the company sought to be charged must not only be alleged, but the further averment of a state of facts showing the right of recovery by the passenger against the company seeking the indemnity, for if no liability existed a voluntary or coercive payment in settlement of the damage sustained will not authorize the assertion of such a claim. The averment that the liability of the appellant and its being compelled to pay the money was caused wholly by the negligence of the defendant, must be construed as meaning that the appellant was entirely blameless, and being without fault assumed the liability of the debt to the passenger for no other reason than his being injured when in appellant's car; or if we must assume, as is contended should be done, that the language *wholly to blame* means the plaintiff was wholly to blame as between the plaintiff and the defendant, still there is no averment of any fact authorizing the conclusion that the appellant was guilty of any negligence, or of such negligence and want of care as would authorize a recovery by the

passenger by reason of the appellant's failure to carry him safely to his destination.

There can be no doubt that a recovery could be had by the appellant against the appellee if the injury to its car was the subject of the action, but for an injury to the passenger in its car caused by a stranger the appellant could not be held liable unless it neglected to use that high degree of diligence required of the carrier for the safety of its passenger.

We are asked to infer from the statements contained in this petition in order to make a cause of action: First, that the words *wholly to blame* apply alone as between the plaintiff and the defendant, and secondly, to assume that some neglect or want of diligence must have been shown on the part of the plaintiff to authorize a recovery by the passenger, or a satisfaction to him by the plaintiff of his demand for compensation.

It is manifest that at such a crossing it was the duty of the appellant, or those in charge of its train, to use every precaution the highest degree of diligence could suggest in order to protect the passenger from danger, or from being injured by approaching trains on the defendant's line of railway, still we are not authorized to say in the absence of any averment that the appellant had failed to discharge its duty in this regard, or if it failed to do so the extent to which its neglect or want of diligence contributed to the injury. If this court is required to assume that the appellant's want of care and diligence gave to the passenger a cause of action against it, for the same reason it might be said that but for appellant's fault the accident would not have happened, or that it was a tortfeasor with the appellee.

The appellant recognizing its liability to the passengers by the payment of this money, and failing to allege facts

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showing that such a liability existed, must be regarded in no other light than as one having compensated the passengers for the injury done them by the defendant, and now seeking to be substituted to their rights as against the appellee.

Where both parties are negligent, and one to a less extent than the other, there might be cases in which the greater offender may be held liable by the lesser offender for damages incurred by the joint act. As to personal injuries, where each wrongdoer is the active participant in the commission of the injury, but one to a less degree or extent than the other, we have been cited to no case where contribution can be had. The cases cited as well as the text books establish the rule that where two or more persons unite and are guilty of a tort resulting in injury to another, the injury or damage resulting from their joint or concurrent acts, if one is made liable he can have no claim for indemnity against the other, and on the other hand where one commits the tortious act, and another by reason of his relation to the party committing it is required to account in damages to the party injured, he may recover. (*Gray v. Boston Gas Light Company*, 114 Mass., 149; *Lowell v. Railroad Co.*, 23 Pick., 24.)

It is under the latter rule the appellant is asserting its claim, and it might be well founded, if the negligent act of the appellee causing such injury to the passenger in appellant's car gave to the appellant a cause of action, as it did for the injury to its car.

The defendant, appellee, was liable to the passenger, and no liability existed on the part of the appellant unless it contributed to the injury, or by reason of its own fault the passenger was placed in danger, and if in such a case the

one less in fault than the other can recover, the facts upon which the recovery is based must be stated.

The class of cases in which wrongdoers are held as not being *in pari delicto* are where the one asking for indemnity was not an actual participant in the wrong, but by reason of the negligent act of some one acting under his authority the liability arises. In the case of *Lowell v. Boston & Lowell R. Co.*, the railroad company was empowered to construct its road across the highway over which the city of Lowell had control, and in excavating across the road barriers were placed near the cut to protect travelers. The workman on one occasion neglected to put up the barriers, having taken them down to enable him to work, a traveler was injured and the city of Lowell being made liable sought indemnity against the railway company and recovered. Illustrations of the rule and its application are also given in that case, as if A with a forged warrant should arrest B and command C, showing him the warrant, to confine B until he could carry him to prison, and C, ignorant of the forgery, confines B and is made liable, C may sue A for indemnity although both are trespassers.

They are not, however, *in pari delicto*, and in such cases the principal offender is held liable; and so in this case the principal offender would be held liable unless it appeared the appellant's negligence at that time contributed to the injury; if so this court would not measure the degree of negligence on the part of either with a view of giving indemnity. That the appellant was grossly negligent or slightly negligent will not be determined for the purpose of ascertaining there was a less degree of neglect on its part causing the injury than on the part of the appellee.

The judgment sustaining the demurrer is therefore affirmed.

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CASE 24—PETITION EQUITY—MARCH 15.

Butler, &c v. Butler, &c.

APPEAL FROM JEFFERSON CIRCUIT COURT, COMMON PLEAS DIVISION.

1. CONSTRUCTION OF DEVISE—PER STIRPES DISTRIBUTION.—Where a testator devised to his two sons in trust for their children "equal interests" in a house and lot, the children of the sons took *per stirpes* and not *per capita*, as the gift of the "equal interests" was to the two sons, each holding his share in trust for his children.
2. SAME.—Upon the death of a child of one of the sons, one-half his share passed under the statute to his father and mother, and, the father having since died, the mother is entitled in fee to one-half of the interest which thus passed to her and the father, and is entitled to dower in the other half.

JAMES R. W. SMITH^f FOR APPELLANTS.

1. The grandchildren take *per capita*. (Purnell, &c., v. Culbertson, 12 Bush, 369; Brown's Ex'ors v. Brown's Devisees, 6 Bush, 648; Wells, &c., v. Newton, 4 Bush, 158; Howell v. Tyley, 91 N. C., 207; Losey v. Westbrook, 35 N. J. Eq., 116; Kimbrough v. Johnston, 15 Lea (Tenn.), 78; 5 Am. Probate Reports, 455; Huntress v. Place, 137 Mass., 409; Lea v. Lea 9 Barb., 172; 9 S. C. Eq., 459; S. C. Chancery, 152; Bacon's Abr., 348.)
2. The judgment is erroneous in that it makes no provision for the recovery by Elizabeth A. Butler of her undivided one-eleventh interest in the property which descended to her by the death of her two children.

BULLITT & SHEILD FOR APPELLEES.

The grandchildren take *per stirpes* and not *per capita*. (Raymond v. Hillhouse, 45 Conn., 467; Walker v. Griffin's Heirs, 11 Wheat., 375; Lockhart v. Lockhart, 3 Jones N. C. Eq., 207; Roome v. Counter, 1 Halst. R., 111; Bool v. Mix, 17 Wend., 119; Jackson v. Lugere, 5 Cow., 221; Kilgore v. Kilgore, 26 N. E. Rep., 56 Lackland v. Downey's Heirs, 11 B. M., 32; Luke v. Marshall, 5 J. J. Mar., 363.)

JUDGE HAZELRIGG DELIVERED THE OPINION OF THE COURT.

Abby C. Butler, having in the first clause of her will devised certain of her property equally to her two sons, Rich-

ard and Joseph, by the second clause thereof provided as follows:

"Item second. I also give and bequeath to my said sons in trust (Richard and Joseph) for their children, equal interests in a house and lot in the city of Louisville, Kentucky, fronting on Chestnut street, between Seventeenth and Eighteenth streets, number 691."

Upon the death of the testatrix Richard had seven children and Joseph four children, and the question on this appeal is, Do the children take *per stirpes* or *per capita*? The chancellor decided that the two sons took the property equally, and each held one-half of it for his children; and this, we think, was the proper construction.

The sentence may be read thus: "I give to my sons, Richard and Joseph, equal interests in the house and lot in Louisville, in trust for their children." It seems to us manifest that the gift of the "equal interests" in the property is to the two sons, and that the clause when grammatically construed can mean nothing else. It does not matter that the ultimate beneficial owners are the children. That results from the use of the words "in trust" and "for their children." The language in itself imports a gift to the two sons in equal shares, to be held, however, by them in trust for their respective children. The words "in trust" and "for their children" are parenthetical clauses, and while they control the ultimate disposition of the property, the sentence may be intelligently read without them; thus, "I give and bequeath to my said sons, Richard and Joseph, equal interests in the property."

Then in putting in the parenthetical clauses, which do not affect the meaning of the words of the immediate grant, we ascertain that the ultimate beneficiaries are the children. The immediate grantees are the two sons, who take "equal

interests" in the property, but who hold their said interests respectively for their children.

In the disposition of her property in the first and fourth clauses of her will, the testatrix had manifested an intention to equalize her two sons, her only children, and so she intended, we may fairly assume, that the property which she placed in each son's control for his children should consist of equal proportions.

The judgment below therefore, so far as it affects the appellees, will not be disturbed.

It is insisted for the appellant, Elizabeth A. Butler, who is the widow of Richard, that the judgment in fixing the respective interests of her children in the half devised to them disregards her rights. It appears that after the death of the testatrix two of Richard's children died intestate and unmarried, and under the statute one moiety of the property of each passed to the father and mother. She, therefore, became entitled to one-fourteenth of the property in fee, and her husband Richard dying recently, she is entitled to dower in the one-fourteenth he had inherited from his sons. The judgment seems to deny her this interest in fee. This matter affects only the appellants, and as no issue was raised between them, we only determine her interest as it now appears from the record, and reverse the judgment only because the lower court might not otherwise have power to correct it if affirmed.

The costs of this appeal are to go in all respects as if the judgment were affirmed.

Reversed for proceedings consistent herewith.

CASE 25—PETITIONS—MARCH 19.

Griffith, &c v. Owensboro, &c R. Co.

APPEAL FROM DAVEISS CIRCUIT COURT.

1. **LIVERY OF SEIZIN—RE-ENTRY UPON BREACH OF CONDITION SUBSEQUENT IN DEED—RENTS.**—The common law as to livery of seizin does not prevail in this State; and therefore no necessity exists for a re-entry in order to avoid an estate which has been defeated by the breach of a condition subsequent in a deed.

Where land was conveyed to a railroad company for the purpose of a depot, with a condition in the deed that if its use for that purpose should be discontinued the grantors should have the right to resume the possession, allowing the railroad company to remove its improvements, with the right to the railroad company however to acquire the fee-simple title to the land by paying its value at the date of the deed, if it should elect to do so, the railroad company having removed its depot, and failed to elect to pay the value of the ground, the possession reverted to the grantors, and they are entitled to rent from the time they demanded possession, and not merely from the time they made a re-entry by going upon the ground and declaring a purpose to resume possession.

2. **SAME.**—The grantors were entitled to maintain an equitable action to have the effect of the deed declared and to recover rents.

C. S. WALKER FOR APPELLANTS.

1. A deed whenever it contains a clause of re-entry or forfeiture in the event the grantee fails to do certain things, always creates a condition subsequent, and when the condition is broken the grantors may "lawfully re-enter and repossess themselves of the estate granted, and thus terminate the estate of the grantee." (*Post v. Well*, 115 N. Y., 361; s. c., 12 Am. St. Rep., 814; *Raly v. Umatilla Co.*, 15 Oregon, 172; s. c., 3 Am. St. Rep., 148-150; *Kenner v. American Contract Co.*, 9 Bush, 202.)
2. As the deed did not convey the fee-simple title a re-entry was not necessary. All that could be required was the written notice given appellee before suit. (*Kenner v. American Contract Co.*, 9 Bush, 207; *Hammond v. Port Royal, &c., Ry. Co.*, 15 Schands (So. Car.), 10; s. c., 11 Am. and Eng. R. Cases, 371.)
3. The equity action was for the rescission of the contract, while the

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common law action was an action in ejectment, and appellants had the right to both remedies. (Coleman v. Cross, 4 B. M., 268; Julian v. Pilcher, 2 Duv., 254; Newman's Pleading and Practice, 484; Civil Code, sec. 92, subsec. 3.)

4. Where one recovers for the betterments he must account for the rents during his wrongful possession, and the statute of limitations has no application until such account is made. Certainly the same rule must obtain where the wrongful occupant is permitted to remove the improvements. (Whiting's Heirs v. Taylor's Heirs, 8 Dana, 441.)

WILBUR F. BROWDER FOR APPELLEE.

1. The deed was not a conveyance of a mere easement, or of a mere incorporeal hereditament, but it was a simple deed of conveyance by which the property was conveyed to the company absolutely upon condition that the company would occupy and use the ground for its Owensboro depot; or if it chose to discontinue the use of the ground for such purposes, then at the election of the company the ground should still belong to the company, provided it should pay the grantors the value of the property as of January 20, 1869.
2. A condition subsequent is one which operates upon an estate already created and vested, and renders it liable to be defeated. It is a rule that such conditions are not favored by the law, and that estates created upon such conditions are not defeated by a mere neglect or refusal to perform the condition, but they are voidable only by the grantor by some act equivalent to a re-entry at common law. (Ludlow v. New York & Harlem R. Co., 12 Barb., 440; Kenner v. American Contract Co., 9 Bush, 206.)
3. A re-entry is the act of resuming possession of lands or tenements in pursuance of a right which the party exercising it reserved to himself when he quit the former possession. (Bouvier's Law Dict., vol. 2, p. 429.)

The commencement of the equitable action in 1886 for the rescission of the contract was not equivalent to a re-entry, nor was the commencement of the common law action tantamount to a re-entry, but when the appellants actually went upon the property in February or January, 1889, they became entitled to resume possession by the terms of the deed and are entitled to rent only from that time.

JUDGE PAYNTER DELIVERED THE OPINION OF THE COURT.

On the 20th day of January, 1869, D. M. Griffith and W. N. Sweeney conveyed to the Owensboro & Russellville Rail-

road Company (now the Owensboro & Nashville Railroad Company), a certain parcel of ground near the city limits of Owensboro. The conveyance was made in consideration that the railroad company would locate its Owensboro depot on the ground conveyed.

The habendum is as follows:

"To have and to hold said parcel of ground for the use of said railroad depot and other railroad purposes such as they may deem proper, to the said party of the second part so long as the same shall be used for said purposes. But in the event the said railroad shall discontinue the said point as a depot for the said road, and said ground shall no longer be useful for said purposes, or should the road be discontinued when built, then said Griffith & Sweeney have the right to resume the possession of said property, allowing said railroad company the right to remove any improvements they may have put thereon, or in default of this and at the election of said railroad company they may by paying to Griffith & Sweeney the present value of said property entitle themselves to the absolute fee simple, and said Griffith & Sweeney will in this contingency execute any further conveyance that may be necessary to such vesting of the absolute title."

The appellee removed its Owensboro depot to another place in the city in 1877.

The appellants gave appellee notice to remove the improvements it had on the ground, or elect to pay them the value of the property of the date January 20, 1869, but that upon its failure to elect they would resume possession of the ground.

Refusing to elect, but retaining possession of the ground, the appellants instituted an equitable action to recover the ground and rents.

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Pending that action the appellants commenced this action to recover the possession of the land. The court below adjudged that they were entitled to recover the possession, and this court affirmed that judgment.

On a return of the case it was consolidated with the equitable action, and in which consolidated action the court adjudged that appellants were entitled to recover rents from the 2d day of February, 1889, until April 27, 1892.

From that judgment this appeal is prosecuted.

The court proceeded upon the idea that the appellants were not entitled to recover rents until they made a re-entry upon the ground by going upon it and declaring a purpose to resume possession. This was done in January or February, 1889.

It is insisted that appellants' right to possession did not accrue until that form of re-entry was made. In this we do not agree with counsel.

This court held in this case on the former appeal that the deed simply granted the "possessory right" to the land to continue as long as it was used for depot purposes, and there having been a breach of the condition in the deed the possession reverted to the grantors.

It is not necessary to enter into a discussion as to the kind of estate created by the deed, or as to whether or not at common law the re-entry insisted on would have been necessary to have enabled the grantors to recover possession of the land.

At common law when from the character of the estate conveyed it was necessary to have livery of seizin, then if in such deed there was a condition subsequent, the breach of which would entitle the grantor to be re-invested with the estate conveyed, a re-entry or claim was necessary to avoid the estate of the grantee.

The reason of the law was that in cases when the deed conveyed such an estate as made a livery of seizin necessary, in order to regain the estate on account of a breach of the condition subsequent contained therein, the grantor must make an entry to defeat the livery which was made. However, in cases where the entry could not be made, then a claim was tantamount to an entry.

In 4 Kent, p. 128, it is said:

"It was a rule of the common law that when an estate commenced by livery it could not be determined before entry."

It is said (1 Sheppard's Touchstone 153): "Regularly when a man will take advantage of a condition he must enter, for an estate of freehold or inheritance will not cease without entry or claim. When an estate is upon condition in deed * * * the law permits the estate to continue beyond the time when the contingency happens, unless either the grantor or his heirs make an entry or claim in order to avoid the estate." (2 Blackstone, p. 155.)

The necessity for livery of seizin does not exist in this State. Without that necessity none exists for a re-entry to be made in order to avoid an estate which has been defeated by a breach of a condition subsequent in a deed.

Livery of seizin is now abolished in England. Statutes 8 and 9 Vic., ch. 106.

To prove that the common law as to livery of seizin does not prevail in this State, it seems to us that a quotation from 2 Blackstone, p. 314, as to how livery of seizin in deed was performed will suffice. It is as follows: "The feoffor, lessor, or his attorney together with the feoffee, lessee or his attorney * * * come to the land or to the house, and there in the presence of witnesses declare the contents of the feoffment or lease on which livery is to be made. And

then the feoffor, if it be land, doth deliver to the feoffee, all other persons being out of the ground, a clod or turf, or a twig, or bough there growing, with words to this effect: 'I deliver these to you in the name of seizin of all the land and tenements contained in this deed.' But if it be of a house, the feoffor must take the ring or latch of the door, the house being quite empty, and deliver it to the feoffee in the same form; and then the feoffee must enter alone and shut to the door and then open it and let in the others."

As this mode of delivering possession of land is no longer necessary, it follows that it was unnecessary for appellants to go upon the ground and declare they had re-entered thereon.

By the terms of the deed the appellee had the right to elect to keep the ground which appellants had conveyed it by paying the value of it at the date of the deed, but failing to make the election then appellants were entitled to have possession returned to them on demand, be it either written or verbal.

Failing to surrender it on such demand then their cause of action accrued for the possession and rents of the ground, and the court should have allowed rents from the date of appellants' demand on appellee to comply with the terms of the deed. It was error for the court to allow rents only from the date of the figurative re-entry.

Appellants are entitled to maintain the equitable action, to have the effect of the deed declared and to recover rents.

The judgment is reversed with directions that further proceedings be had consistent with this opinion.

CASE 26—PETITION FOR MANDAMUS—MARCH 19.

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&c R. Co.

APPEAL FROM BRACKEN CIRCUIT COURT.

1. **TITLE OF ACT.**—An act of the legislature providing that the council of the city of Augusta may issue bonds of the city to a certain amount in aid of any railway company that will construct a railroad through the city, provided a majority of the voters of the city shall vote in favor thereof at an election held for that purpose, relates to the powers and duties of the governing body of the city, and the subject is sufficiently expressed by the title: "An act to amend the charter of the city of Augusta."
2. **ISSUAL OF BONDS BY CITY IN AID OF RAILROAD COMPANY.**—Where pursuant to such an act a favorable vote has been had under an ordinance providing that the bonds are not to issue until the road is built, that condition having been complied with the company is entitled to the bonds without any further contract or subscription upon the part of the city, and the city has no discretion in the matter. The words "may issue bonds," as used in the act, are to be regarded as compulsory and not as permissive merely.
3. **SAME.**—When a public power for the public benefit is conferred in enabling terms a duty is impliedly imposed to exercise it whenever the occasion arises.
4. **SAME.**—In determining whether the company has complied with a condition of the ordinance that the road should be completed within two years, excepting such delays as might be caused by "floods," the company is entitled to have deducted the time during which it was prevented by "high water" from making any progress, whether or not the water reached the height it had reached in noted floods.
5. **NOTICE OF ELECTION.**—Where the law fixes the time for holding an election the notice otherwise required to be given may be dispensed with.

GEORGE DONIPHAN AND R. K. SMITH FOR APPELLANTS.

1. The act pleaded in the petition authorizing the vote and the issual of the bonds is unconstitutional because the title is delusive.
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- Acts 1883-84, vol. 1, pp. 1270, 1271; Acts 1849-50, p. 183, *et seq.*: Acts 1876, vol. 1, p. 424, *et seq.*)
2. The petition is subject to demurrer because it does not set out any call or notice of the election. The enabling act of the General Assembly does not prescribe the time, manner or place of holding the election, or the kind of notice to be given. This then leaves the city council bound by the manner of holding elections generally for the city, and the same notice must be given as provided by the charter, which requires notice of thirty days. (Acts 1876, vol. 1, p. 425, sec. 6; Beach on Railways, p. 234, sec. 206; State v. Young, 4 Iowa, 561.)
 3. The petition is defective because it does not show any contract, donation or subscription on the part of the city, or any acceptance by the plaintiff, railway company, or any one for it. The note does not constitute a valid subscription, nor does it constitute a contract of any kind. Some further action must be taken by the council. (Dillon's Mun. Corp., vol. 1, sec. 538; Beach on Railways, vol. 1, sec. 218; Cumberland & Ohio R. Co. v. Barren Co., 10 Bush, 604; Aspinwall v. Comm'rs of County of Daviess, 22 How., 364; Covington & Lexington R. Co. v. Kenton County Court, 12 B. Mon., 144; Town of Concord v. Portsmouth Savings Bank, 92 U. S., 629; County of Bates v. Winter, 97 U. S., 89; Nugent v. The Supervisors, &c., 19 Wall., 241; County of Moultrie v. Savings Bank, 92 U. S., 631.)
 4. The use of the word "may" was intended to give the council a discretion. (14 Am. & Eng. Enc. of Law, p. 979, *et seq.*)
 5. Under the ordinance of May 1, 1886, the railway company was to do several things as conditions precedent. Whether or not these conditions have been performed is to be determined by the municipal authorities themselves; they can not delegate that duty to others. And their judgment is final. (15 Am. & Eng. Enc. of Law, p. 1274; Jackson Co. v. Brush, 77 Ill.; Mut. Ben. Life Ins. Co., v. Elizabeth, 42 N. J. L., 235; Knox County v. Nichols, 14 Ohio St., 260; People *ex rel* v. The County Board of Cass County, 77 Ill., 438; People v. County of Tazewell, 22 Ill., 147; 1 Ohio St., 14.)
 6. The court erred in refusing to permit appellants to prove that there had been no "floods" within the period within which the railroad was to have been completed. There is a distinction between "floods" and "high water."

A. M. J. COCHRAN FOR APPELLEES.

1. Where the enabling act makes it the duty of the governing board to make a subscription or other contract for aid payable in bonds

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or money, and prescribes a vote as a condition precedent to the obligation to perform the duty, upon the taking of the vote the railroad company has an enforceable right by reason of the vote itself, and before any subscription or contract has been made. (*Livingston Co. v. Portsmouth Bank*, 128 U. S., 102; *Allison, &c., v. L., H. C. & W. Ry. Co.*, 10 Bush, 1.)

The enabling act in question here imposed upon the Mayor and Board of Councilmen the duty to make a subscription upon a favorable vote, and did not leave them any discretion. The word "may" was used in the sense of "shall" or "must." (Endlich on Int. of Statutes, secs. 310, 311, 312, 314.)

2. While it was not necessary there should be a subscription or other contract between the city of Augusta and the railroad company in order to entitle it to the aid sued for herein, yet, as a matter of fact, there was such a subscription or contract. (*Langdell on Contracts*, p. 1; *County of Bates v. Winter*, 97 U. S., 89; *Nugent v. Supervisors*, 19 Wall., 241; *County of Moultrie v. Savings Bank*, 92 U. S., 631; *Trustees of Clark Co. v. Paris, &c.*, 11 B. M., 143.)
3. The subject of the act is sufficiently expressed in the title. (*Phillips v. Cov. & Cin. Bridge Co.*, 2 Met. 219.)
4. The ordinance providing for the election was a calling of the election, and no notice was necessary. (*Doores v. Varnon*, 28 S. W. Rep., 853.)
5. The delay in the construction of the road was caused by "floods" within the meaning of the act. (Endlich on Int. of Statutes, sec. 28.)

JUDGE HAZELRIGG DELIVERED THE OPINION OF THE COURT.

The appellant Board on May 1, 1886, ordered an election by the qualified voters of the city of Augusta, to be held on May 15th thereafter, for the purpose of ascertaining the will of the people in regard to the issual of the bonds of the city for the sum of four thousand dollars, in aid of procuring the right-of-way for the appellee company in constructing its railroad.

The ordinance provides that the bonds shall not be issued or delivered to the company "until the Maysville & Big Sandy Railroad is completed as a standard gauge road, and is equipped with rolling stock of locomotives, coaches, etc.,

and a train has passed over the road from Ashland, Boyd county, Kentucky, through Augusta, Kentucky, to Covington, Kenton county, Kentucky."

And further, that the company would "cause to be issued to the city certificates of stock in said Maysville and Big Sandy Railroad to the amount of four thousand dollars in shares as the railroad charter specifies," etc.

And moreover, "that if the vote of the city is in favor of the issue of said bonds, it will be of no binding force upon the city. if the railway is not constructed and equipped within two years from the date the vote is taken, excepting such time as may be lost by cause of floods."

In pursuance of the provisions of the ordinance the election was held under the supervision of the officers appointed by the board, the vote resulting largely in favor of the issual of the bonds. Thereupon, the road was completed and equipped as required by the terms of the ordinance, and on or about January 1, 1889, ran its first regular trains from Ashland to Covington.

Upon the refusal of the board to issue the bonds for the reason as alleged at the time that the road had not been completed in the stipulated time, this action was brought by the company for the use of certain citizens who had guaranteed a fund for the payment of the rights-of-way over the line proposed, and who were therefore the real parties in interest in the suit, to compel the issual of the bonds as provided in the ordinance. Various defenses were interposed to prevent recovery.

The act of the General Assembly upon the authority of which the vote was taken, and the subscription made, was entitled, "An act to amend the charter of the city of Augusta, in Bracken county," and it provided for an issual of the bonds of the city to the extent of \$25,000, as subscription to the

capital stock of the Cincinnati & Southeastern Railway Company, which subscription had been approved by a prior vote of the electors of the city, and the third section of which is as follows: "In the event the said Cincinnati & Southeastern Railway Company fail to build their road, the city council may, at any time in the future, issue bonds of the city to the amount of \$25,000, * * in aid of any railway company that will construct a railroad through said city: Provided, a majority of the legal voters voting of said city shall vote in favor thereof at an election called and held for that purpose."

It is conceded by the appellants that long prior to the adoption of the ordinance of May 1, 1886, the enterprise of the Cincinnati & Southeastern Railway Company had fallen through, and that the conditions existed upon which the vote might be taken on the proposition to subscribe to the capital stock of any road proposing to run through the city of Augusta, but it is urged by demurrer to the petition and by plea that the act of the General Assembly authorizing the issuance of the bonds upon the vote of the people therefor is unconstitutional in that its title is not expressive of the subject matter embraced in it; that the petition does not aver that any notice was given of the time for holding the election; that there was in fact no contract of subscription, the allegations of the petition stopping at the point where the vote merely is alleged to have been taken, and that vote, they say, does not amount to a contract of subscription, or control the discretion lodged in the mayor and councilmen to issue or not issue the bonds in question; that the private citizens who guaranteed the rights-of-way over the proposed route, and thus became entitled to the subscription, did so before the vote of the city was taken, and hence, their action was not induced by the vote, and the road was

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not built on the pledge of this subscription to the road; that the present constitution took effect before the rendition of the judgment below, and the city is prohibited from taking stock in railroads; that the road was not completed within the time prescribed in the ordinance, and the delay was not caused by floods.

All the grounds relied on were deemed insufficient by the court below, and judgment resulted for the plaintiffs.

It is only necessary to refer without elaboration to the long line of decisions of this court construing section 37, art. 2 of the old constitution on the subject of valid titles to acts of the General Assembly, to dispose of the appellant's objection on that behalf.

The act in question affected the powers and duties of the governing body of the city, and pertained to the legitimate exercise of its functions. (See *Phillips v. Covington & Cincinnati Bridge Company*, 2 Met., 219; *Swift v. City of Newport*, 7 Bush, 37; *City of Covington v. Voskotter*, 80 Ky., 219; *McArthur v. Nelson*, 81 Ky., 67.)

It is also well settled that when the law fixes the time for holding an election, the notice otherwise required to be given may be dispensed with. (*Toney v. Harris*, 85 Ky., 475; *Berry v. McCollough*, 94 Ky., 247; *Doores v. Varnon*, 94 Ky., 507.)

The contention that a subsequent subscription depending on the discretion of the board was necessary before a liability to issue the bonds existed is not tenable. The duty of issuing the bonds was rendered imperative by the enabling act, and the vote taken in pursuance of it. By the very terms of the ordinance directing the vote, the adoption of which was an exercise of discretion, it is manifest that upon the vote being cast for the issual of the bonds the company became entitled to them upon the happening of certain

events. The conditions were carefully prescribed upon which the company was not to have them. They were not to be issued or delivered until the road was completed as a standard gauge, and a train was passed thereover from Ashland to Covington, or until a favorable vote was had, or unless the construction was finished within two years.

The necessary conclusion is that when these conditions and requirements were fulfilled the company became entitled to the bonds. Such is the natural meaning of the language of the act of the legislature and the ordinance of the city under which the vote was taken. The act of issuing the bonds was merely ministerial after the conditions upon which they were to issue had been complied with.

If the object of the vote was simply to empower the board to issue the bonds in their discretion, the authorities relied on by the appellants would be in point.

We do not, however, so construe the enabling act and the ordinance of the board. The act empowered the board not to subscribe, but to issue, bonds upon a vote resulting favorably on the question.

It would be singular if after a favorable vote under an ordinance providing that the bonds were not to issue until the road was built, that when the road was built the city was under no legal obligation to issue them. As said by counsel: "It would be a rare city council that would subscribe stock or issue bonds to a railroad already constructed, unless in obedience to some legal obligation incurred when the interest of the city required it."

It is true the words "may issue bonds" are used in the act, but this permissive language does not leave compliance optional. The provisions are to be deemed compulsory because it is the only rational construction to be given the words when looking to the intent and purposes of the enact-

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ment, and the conduct of the parties.

Mr. Endlich in his work on Interpretation of Statutes, after a full discussion of this subject, says: "The result seems to be, that, when a public power for the public benefit is conferred in enabling terms, a duty is impliedly imposed to exercise it whenever the occasion arises." (Sec 312.)

As to the delay in completing the road, the proof is abundant that high water caused it. It is true as contended by counsel that there were no such floods during the period of construction as devastated the Ohio valley in 1847, or in 1883 and 1884, but the testimony is that for many months the water was more than fifty feet over some parts of the work, and for all practicable purposes prevented any progress as completely as if the noted flood of 1847 had revisited the valley.

The judgment is affirmed.

CASE 27—PETITION EQUITY—MARCH 20.

McNees v. McNees.

APPEAL FROM HARRISON CHANCERY COURT.

JURISDICTION.—The court which has rendered judgment granting a divorce and providing for the care and custody of the infant children of the marriage, alone has jurisdiction to grant further relief as to the maintenance of the children.

W. S. CASON FOR APPELLANT.

This action is purely a transitory one, and the Harrison Chancery Court had jurisdiction. The matters involved in this action were never litigated in the Kenton Chancery Court. (Carroll's Code, sec. 78; Gen. Stats., chap. 52, art. 3, sec. 7; Pretzinger v. Pretzinger, 4 Am. St. Rep., 542; Shrader, &c., v. Shrader, &c., 11 Ky. Law Rep., 441.)

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SWINFORD & EVANS FOR APPELLEE.

1. If a recovery can be had at all, it must be had in the Kenton Chancery Court. The Harrison Chancery Court did not have jurisdiction. (Gen. Stata., chap. 52, art. 3, sec. 7; *Buckminister v. Buckminister*, 38 Vt., 248; s. c. 88 Am. Dec., 652-657.)
2. The judgment in the Kenton Chancery Court is a bar to this action. (*Smith, &c., v. Brannin, &c.*, 79 Ky., 114; *Davis v. McCorkle*, 14 Bush, 746.)

JUDGE GUFFY DELIVERED THE OPINION OF THE COURT.

In 1882 the appellant, by judgment of the Kenton Chancery Court, obtained a divorce from the appellee and was also adjudged the care, custody and control of their minor son, Wilmot McNees. In 1891 the appellant instituted this suit in the Harrison Circuit Court seeking to obtain judgment against the appellee for fifteen hundred dollars for care, expenses, etc., in raising and caring for said son.

The defendant demurred to the jurisdiction of the court but the same was overruled, as was also a general demurrer, and the cause was prepared for trial, and upon the hearing the court dismissed the petition of plaintiff and she has appealed to this court.

It is not necessary to decide any of the questions of law or fact made in this case except the demurrer to the jurisdiction of the Harrison Circuit Court. Section 7 of article 3, chapter 52 of the General Statutes provides in substance that pending an application for divorce or on final hearing the court may make orders for the care and maintenance of the minor children, and at any time afterwards, upon the petition of either parent, revise and alter the same. It seems to us the Kenton Chancery Court was the court to apply to for relief if appellant was entitled to any further judgment or order in regard to the maintenance of the child. Many good reasons might be assigned in support of the wisdom

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and propriety of the law vesting the control of such matters in the court rendering the judgment of divorce, but it is not necessary to do so now. It follows from the foregoing that the demurrer to the jurisdiction of the Harrison Circuit Court should have been sustained and that the petition ought to have been dismissed.

The judgment is therefore affirmed.

CASE 28—PETITION ORDINARY—MARCH 22.

Pursifull v. Pineville Banking Company.

APPEAL FROM BELL CIRCUIT COURT.

BANKS—RELEASE OF SURETY.—Where, at the maturity of a negotiable note, the bank at which it is made payable and to which it has been discounted has on general deposit for the principal in the note a sum more than sufficient for its payment, and instead of applying from this unappropriated deposit a sum sufficient to pay the note permits the entire deposit to be checked out, for other purposes, by the principal, who afterward becomes insolvent, a surety in the note is thereby discharged from liability.

W. J. WELLER AND N. B. HAYS FOR APPELLANT.

The bank had a lien upon the deposit of the principal to pay the debt, and by surrendering that security it released the surety. (*Morse on Banks and Banking*, sections 562, 563; *Faulkner v. Cumberland Valley Bank*, 14 Ky. Law Rep., 923.)

The case of *Second National Bank of Lafayette v. Hill*, 76 Ind., 223, distinguished.

WARREN MONTFORT FOR APPELLEE.

The surety was not released by the failure of the bank to apply the principal's deposit to the payment of the debt. (*National Bank Mahaiwe v. Peck*, 127 Mass., 302; *Bank U. S. v. Carneal*, 2 Pet.,

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97	164
111	353
97	154
115	639
115	836

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543; Second Nat'l Bank of Lafayette v. Hill, 76 Ind., 223; Morse on Banks and Banking, sections 557 (b), 563.)

JUDGE EASTIN DELIVERED THE OPINION OF THE COURT.

This action was brought December 12, 1893, in the Bell Circuit Court, by appellee, as assignee of the Pineville Banking Company, against appellant and one Hurst, on a note executed by them December 23, 1889, and payable thirty days thereafter to the order of said banking company, and negotiable and payable at said bank. This note was discounted at and was held and owned by said bank at the time of its maturity, January 23, 1890.

Appellant filed an answer in the court below, in which he alleged, among other things, that he was merely a surety and that his co-defendant, Hurst, was the principal in said note, and that these facts, as well as the fact that he had received no part of the proceeds of said discount, were well known to the bank at the time. Said answer further alleges that, at the time said note matured, and prior thereto, and for some time thereafter, the principal therein was a depositor with, and had to his credit as a general deposit in said bank a large sum of money, much more than sufficient to pay said note, that the bank had a lien thereon for the payment of said note, but without the knowledge or consent of appellant released its said lien and permitted Hurst, the principal in said note, to withdraw the whole of said deposit, leaving the note unpaid; that it did not, at the maturity of said note, or at any other time, notify appellant that the note was unpaid, and that he, knowing that Hurst had this large deposit in the bank at and after the maturity of the note, supposed it had been paid until this suit was brought against him thereon nearly four years thereafter. The answer further alleges that Hurst has, in the mean-

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time, become and is wholly insolvent, and that, if he shall be compelled to pay said note by reason of the bank having released its lien on said deposit, he will now be entirely without remedy against his principal.

To this answer appellee filed a general demurrer, which was sustained by the court, and thereupon, at the same term of court, appellant offered to file and tendered an amended answer in which, after reiterating the statements of his original answer, he also charges that this note, being made negotiable and payable at the bank, was, in effect, an order from Hurst on said bank to appropriate and apply from his deposit therein a sufficient sum to pay the note at maturity; that the bank was thereby made his agent to pay the same, and that, by the negligence of said bank, this application was not made, and the note not paid. It further pleads and relies upon the failure of the bank to apply to the payment of the note other deposits made by Hurst after the maturity of the note and when his insolvency was known to the bank.

To the filing of this amended answer appellee objected and insisted on his demurrer to the answer as offered to be amended, and the court sustained the objection and refused to allow the amended answer to be filed. Appellant declined to plead further, the petition was taken for confessed, a judgment for the amount of the note and interest was entered against him, and from that judgment he prosecutes this appeal.

In view of this statement from the record, and of the action of the court below in sustaining the demurrer to the original answer and refusing to allow the amended answer to be filed, we think there is but one question to be considered by this court.

That question is, whether or not, in this State, the surety,

on a negotiable note, made payable at, and discounted to and owned by, a bank which holds, on general deposit for the principal in the note, at the maturity thereof, a sum more than sufficient to pay the same, is discharged from liability thereon, by reason of the failure of such bank to apply to the payment of the note a sufficient sum from this unappropriated deposit, and by reason of its permitting the entire deposit to be checked out, for other purposes, by the principal who afterwards becomes insolvent?

This question has never been settled by any adjudication of this court, and we are aware that the decisions of the courts of other States are not in entire harmony, and that there is some contrariety of opinion among the text writers on the subject.

In considering the proposition, it is well for us to remember that this bank was the absolute *owner* of this note and not a mere collecting agent to look after the proper presentment of the note, and to demand payment in behalf of another. The bank was the creditor of Hurst, the principal in the note, to the amount thereof, and was his debtor in the amount of the deposit then standing to Hurst's credit in the bank.

As to the *right* of the bank, under the doctrine of set off, to have applied, to the payment of this note, from Hurst's unappropriated deposit, enough money to pay the same, by simply charging the note to his account, there seems to be no difference of opinion, and it is only as to the *duty* of the bank in this respect, as between it and the surety on the note, that the authorities differ.

As to this, Mr. Morse, in his text book, says: "If a note payable at a bank is sent there for collection, and the bank fails to apply an unappropriated deposit of the maker to its payment, the indorser is discharged. When a creditor

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has within his control the means of paying the debt out of property of the debtor properly applicable to the purpose, and does not use the opportunity, but gives up the property, the surety is discharged. (2 Morse on Banks and Banking, 3d edition, sec. 562.)

A similar doctrine is laid down in some of the decisions of the State courts, particularly in the cases from Pennsylvania, in one of which the learned judge, after referring to the well-recognized principles that the relation between the bank and its depositor is simply one of debtor and creditor, and that the bank has the right to apply an unappropriated general deposit to the payment of a matured note held by it against its depositor, which right it may waive unless the rights of third parties have intervened, propounds the following query which seems to us very aptly to illustrate the situation in this case, to-wit:

"If I am the holder of A's note indorsed by C, and when the note matures I am indebted to A in an amount equal to or exceeding the note, can I have the note protested and hold C as indorser? It is true A's note is not technically paid, but the right to set-off exists, and surely C may show, in relief of his obligation as surety, that I am really the debtor instead of the creditor of A. If this is so between individuals, why is it not so between a bank and individuals?" (Commercial Nat'l Bank v. Henninger, 105 Pa. St. Rep. 502.)

Counsel for appellee, however, in support of their contention, that the conduct of the bank in this case, as set forth in the answer and admitted by the demurrer, did not operate as a discharge of the surety, rely mainly upon the cases of National Bank v. Peck, 127 Mass., 302, and Second National Bank v. Hill, 76 Ind. 223.

As to the former, the case from Massachusetts, it is suffi-

cient to say that it is clearly distinguishable from this case. There the bank held two notes of B, one of which was executed by him in his official capacity, as treasurer of a town, and the other was executed by him individually. B kept only a personal account with the bank. The note executed by him in his official capacity was indorsed by P who, a few days after the maturity of that note, presented to the bank the check of B on his individual account and demanded that it be applied to the payment of the official note on which P was indorser. To this demand the bank answered that it had already applied B's deposit toward the payment of his individual note, which had also matured, though not until after the maturity of the official note. In the action which was brought against P by the bank to enforce the collection of this official note which he had endorsed, it was shown that neither this note nor its proceeds ever went into or constituted any part of B's personal account in the bank, and it was accordingly held that the bank, as against the surety on this official note, had the right to charge up B's personal note, which had also matured, against his personal account, as it had already done before this demand was made upon it to pay the official note out of this account. The distinction between that case and this is apparent.

The case in 76 Indiana, *supra*, relied on by counsel for appellee, does fully support the position for which they contend.

But, in that case it is also held, in conformity with the well-settled doctrine on the subject, that a bank has the right, under the state of facts admitted in this case, to apply the deposit to the payment of its demand, if it chooses to do so. It is furthermore held in that case that a creditor may not release a collateral security given by the prin-

principal debtor, or a lien which it may hold on his property, without discharging the surety, and these propositions are, we believe, recognized as fundamental in all the cases. If the security be in the nature of a lien by pledge of collateral, or by mortgage, or under an execution against the principal debtor's property, then, in any such case, it would be admitted that a release by the creditor of such security would discharge the surety to the extent, at least, of the value of the security so surrendered.

Now, while it is true that the bank in this case had not, strictly speaking, a lien upon any money or property belonging to Hurst, and while the surety could not, perhaps, by paying this debt to the bank, have become entitled to demand of it repayment out of Hurst's deposit, which is laid down by some of the authorities as the true test, yet, it seems to us that this bank, by the voluntary surrender to the principal of money more than sufficient to pay this debt, and which it is conceded that it had a right to apply to that purpose, has been equally reckless of the interests of this surety as though it had surrendered a security on which it had a specific lien. As said by the text writer, above quoted from, in criticising this case in 76 Indiana, "If the bank at the maturity of a note held by it holds funds that, by the scratch of a pen, it could apply upon the note, thus securing itself, it is difficult to see why neglecting so easy a means of security is not as improper as giving up collateral expressly designated for the purpose of securing the note." (Morse on Banks and Banking, 3d edition, Vol. 2, sec. 563.)

The right on part of this bank to retain a sufficiency of Hurst's deposit gave it the absolute control of an ample security for the payment of this debt. A lien by pledge could give no higher right to the security than this bank

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had. It had the unquestioned right to actually appropriate and apply this money which it owed to Hurst, to the payment of Hurst's debt to it. It matters not whether the right to the security has its origin in the doctrine of set-off or under a pledge as collateral. It is the extent of the right to the security, rather than the source from which that right springs, that should determine the question whether the creditor can voluntarily surrender the security without releasing the surety; and, having had in its hands a fund which it could, by mere exercise of its option to do so, have used for the satisfaction of this debt, and which, we may assume, the dictates of ordinary diligence and of prudent banking would have prompted it to thus use, this bank has, in our judgment, been guilty of bad faith toward the surety who, according to the facts as they are admitted here, knew of this large deposit to the credit of his principal, who received no notice of the non-payment of the note until nearly four years thereafter, and who assumed, as he had a right to do under these circumstances, that the note had been paid at maturity.

If the facts be as alleged in the answer and admitted by the demurrer, and as we are bound, therefore, to assume them to be, this bank has shown such an utter disregard of, and such absolute indifference to, the interests of the surety, as to entitle him to a release from the liability which would have been satisfied by the principal, if the bank had simply chosen to have it satisfied, and had exercised its option in favor of, instead of against, the surety.

Wherefore, the judgment of the lower court sustaining the demurrer to the answer and rendering judgment against appellant is reversed, and the action is remanded for further proceedings consistent with this opinion.

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CASE 29—PETITION ORDINARY—MARCH 22.

Nashville, &c Railroad Co. v. Commonwealth

APPEAL FROM FRANKLIN CIRCUIT COURT.

TO ENTITLE A PURCHASER OR SUCCESSOR TO BENEFIT OF AN IMMUNITY FROM TAXATION granted to the vendor or predecessor the intention of the Legislature to continue the privilege must be clear and express.

Where a foreign railroad corporation which purchased the property and franchises of a railroad company incorporated in this State was "incorporated under the laws of this State and clothed with all the rights, privileges and powers" embraced in the charter of the vendor, the "rights, privileges and powers" thus conferred can not be regarded as embracing the privilege of immunity from taxation embraced in the vendor's charter.

THOMAS H. HINES AND H. A. TYLER FOR APPELLANT.

The Commonwealth had acquired no right to the taxes on the Hickman & Obion railroad for 1887 to 1891 before the passage of the act of April 24, 1882, and the last mentioned act became a part of the charter of the Nashville, Chattanooga & St. Louis Railroad Company as effectively as if it had been enacted prior to the consolidation of the two roads, and the consolidation had been effected thereunder. (Cooley's Const. Limit., pp. 371, 374; Central Railroad and Banking Co. v. Georgia, 92 U. S., 665.)

The word "privileges" contained in the act of 1882 embraced and conferred upon the Nashville, Chattanooga & St. Louis Railroad Company the exemption from taxation contained in the charter of the Hickman & Obion Railroad Company. (Humphrey v. Pegnes, 16 Wall., 244; Commonwealth v. Owensboro & Nashville R. Co., 81 Ky., 572.)

WM. J. HENDRICK, ATTORNEY-GENERAL, FOR APPELLEE.

JUDGE LEWIS DELIVERED THE OPINION OF THE COURT.

By terms of the act passed in 1854, incorporating Hickman & Obion Railroad Company, its property was exempt from taxation, and in lieu thereof the stockholders resid-

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ing in this State were to pay taxes upon stock held by them under what is known as the equalization law.

In 1855 that company leased its entire property to the Nashville & Northwestern Railroad Company for the period of one thousand years, and it was subsequently acquired by the Nashville, Chattanooga & St. Louis Railroad Company. That lease was evidently intended to be and was in legal contemplation equivalent to an absolute sale.

This action was brought in 1892 by the Commonwealth to recover of the latter company taxes due upon that part of its railroad property within this State which had been duly assessed, yet remained unpaid for several years. And upon appeal judgment of the lower court dismissing the action was reversed. (See 93 Ky., 430.)

Practical effect of restricting the Commonwealth to taxation upon stock held by resident stockholders was to ultimately exempt stockholders as well as that company from all taxes. And in the former opinion it was held that such immunity was not, nor could without direct sanction of the General Assembly, if at all, be transferred by one corporation to the other. But upon return of the case defendant, now appellant, the Nashville, Chattanooga & St. Louis Railroad Company, filed an amended answer referring to and relying upon "An act to incorporate the Nashville, Chattanooga & St. Louis Railroad Company," approved April 24, 1882, whereby it was "incorporated under the laws of this State and is clothed with all the rights, privileges and powers, and subject to like restrictions, as are embraced in the charters of the Hickman & Obion Railroad Company in Kentucky and the Nashville, Chattanooga & St. Louis Railroad Company in Tennessee."

In *Commonwealth, &c., v. Masonic Temple Company*, 87 Ky., 349, cited in former opinion in this case, it was held that

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to entitle a purchaser or successor to benefit of an immunity from taxation granted to the vendor or predecessor intention of the legislature to continue the privilege must be clear and express, relinquishment of the taxing power of a State never being presumed.

The rights, privileges and powers with which the Nashville, Chattanooga & St. Louis Railroad Company was clothed by the act of 1882 must according to that just and salutary rule of construction be regarded only such "as were essential to existence of the corporation or accomplishment of the object of its creation, and not as including immunity from taxation which is a privilege the legislature may grant to one company and not intend nor have the power to grant to another." It does not appear that appellant, a foreign corporation, has undertaken, or is capable of performing, public services, in meaning of the constitution, that entitled it to the privilege of immunity from taxation imposed upon other railroad companies in the State, and it can not be reasonably presumed the legislature ever intended to grant it.

Judgment affirmed.

CASE 30—PETITION ORDINARY—MARCH 23.

Shelley v. McCullough.

APPEAL FROM JEFFERSON CIRCUIT COURT, COMMON PLEAS DIVISION.

1. ELECTIONS TO FILL VACANCIES IN CITY OFFICES.—Section 152 of the Constitution which provides for the filling of vacancies in "all elective offices," applies to offices for towns and cities as well as those for larger territories, and to offices created by the General Assembly as well as to those created by the Constitution. And the provision of section 160 of the Constitution, empowering the

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99	561

97	164
107	147

General Assembly to prescribe how vacancies in offices for towns and cities may be filled is to be construed in connection with section 152, and, therefore, can not be regarded as empowering the General Assembly to provide for the filling of such vacancies for a longer time than is provided by that section.

Section 2791 of the Kentucky Statutes (part of the charter of cities of first-class), which provides that it shall be the duty of the Mayor to fill "all vacancies in executive and ministerial offices not herein otherwise provided for," does not, when considered in connection with the provisions of the Constitution, authorize the Mayor to fill such vacancies for the whole of the unexpired term without regard to when the vacancy occurred. Therefore, a vacancy in the office of tax receiver occurring more than three months before the next general election, the Mayor had power to appoint only until that election and not for the whole of the unexpired term.

2. A VACANCY IN A CITY OFFICE MAY BE FILLED AT THE NEXT SUCCEEDING ELECTION, as provided by section 152 of the Constitution, although city officers are not then to be elected; though it may be that a vacancy in an office for a larger territory could not be filled at an election at which city officers only were to be elected.
3. SIMULTANEOUS HOLDING OF CITY AND CONGRESSIONAL ELECTIONS.—Section 148 of the Constitution, which prohibits the simultaneous holding of city and congressional elections, does not prohibit the filling of a vacancy in a city office at the time of a congressional election.

KOHN, BAIRD & SPINDLE FOR APPELLANT.

1. If an election was not demanded in November, 1894, by any law then in existence, the election of appellee was wholly void. There can be no estoppel in a matter of public right. (Payne on Elections, sec. 214, p. 185 and authorities there cited.)
2. Under the old Constitution the Legislature had absolute control over municipal offices. (Third Constitution of Ky., art. 6, secs. 6, 7; *Police Commissioners v. City of Louisville*, 3 Bush, 599; *Speed v. Crawford*, 3 Met., 211; *Paducah v. Cully*, 9 Bush, 325; *Williams v. Newport*, 12 Bush, 439; *Buckner v. Gordon*, 81 Ky., 667; *Bennett's Code of Louisville*, pp. 464, 466, 472, 785.)
3. Vacancies in city offices can be filled by appointment. (Constitution of Ky., sec. 160; *Barbour & Carroll's Statutes*, secs. 2788, 2791, 2904; 19 Am. & Eng. Enc. of Law, pp. 416, 417, 430; *People v. Comstock*, 78 N. Y., 358; *Sturgis v. Spofford*, 45 N. Y., 449; *State v. Covington*, 29 Ohio St.; *State v. Glenn*, 7 Heisk. 481; *Debates of Const. Convention*, pp. 2918, 2986.)

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4. City officers can be elected only in odd years. (Constitution of Ky., secs. 167, 148; Constitutional Debates, vol. 2, 1939, 1981, 2080; Berry v. McCollough, 15 Ky. Law Rep., 117.)
5. If doubt exists statute is to be held constitutional. (Lexington v. McQuillan, 9 Dana, 513; Louisville v. Hyatt, 2 B. Mon., 178; Collins v. Henderson, 11 Bush, 74.)

ZACK PHELPS ON SAME SIDE.

Section 152 of the Constitution did not provide for *all vacancies*, but expressly announced that it was subject to exceptions, section 160 being the exception. So that section 160 required or commanded the Legislature to pass the charter and provide for the filling of vacancies in city offices, or, in other words, gave the fullest authority to the Legislature to do it, and made it incumbent on the Legislature to do so and allowed them to regulate the subject in any way they chose, but with the restriction that the election should not be in the same year as the election of a congressman. (Constitution, sec. 148). And with the further restriction that an election to fill a vacancy must be in an odd year.

The General Assembly had full power to regulate the matter, subject only to these restrictions. (Constitution of Ky., secs. 98-160, 167; Debates of Constitutional Convention, pp. 2911, 2915, 2916, 2918; secs. 28 and 119 of City Charter of 1894; Ky. Stats., secs. 1521 and 1522; Park Act, sec. 81 of City Charter; Berry v. McCollough, 15 Ky. Law Rep., 117.)

BURTON VANCE FOR APPELLEE.

1. The tax receiver of the city of Louisville is an "elective" officer, to be elected by the people every four years, commencing with the election of November, 1893. (Constitution 167, Statutes 2904, 2784.)
2. The tax receiver elected in November, 1893, dying in December, 1893, a vacancy was created in the office which the Mayor was required to fill by appointment with the consent of the Board of Aldermen, until the "next succeeding annual election." (Statutes, 2791; Constitution, 152.)
3. By the phrase "next succeeding annual election" is meant the next election at which candidates for any of the offices mentioned in sec. 152 are to be voted for by the people.
4. There can be but one election each year. (Constitution, 148.)
5. No officer of any class mentioned in sec. 152 is elected annually, and there can be no annual election in any class. (Constitution, secs. 91 to 99, 112-115, 31-37, 160-167; Statutes, 2784, 2904, 2768.).

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6. "Next succeeding annual elections" can not mean biennial, triennial or quadrennial elections, because that would be to wholly ignore the plain meaning of the word "next," "succeeding" and "annual." Every word in the organic law must be given effect.
7. The title of the Constitution "Suffrage and Elections" embracing secs. 145-155 inclusive, govern elections for city officers to exactly the same extent they do county, State and district officers. Note the frequent use of the word "city" in secs. 147, 158, 152. Also the exact phrase in sec. 148 used in 152 "city, town, county, district."
8. The exception of school trustees by sec. 155, from the operation of 152 is in effect the express declaration of the inclusion of all other offices.
9. Title "Municipalities" does not provide a complete system of election laws for city officers, nor are its provisions exclusive of the provisions of title "Suffrage and Elections," but subordinate thereto and must be construed in harmony therewith.
10. The concluding sentence of sec. 160 confers upon the Legislature power to provide by law how the "appointive" part only of vacancies in city offices shall be filled. Compare with the like provision in section 152 following the general provisions for filling the "elective" part of a vacancy.
11. Section 2791 confers upon the Mayor only power to appoint for the appointive period *created by* sec. 152. Compare language of 2791 with like provisions as to Governor in 152.
12. The Constitutional Convention intended sec. 152 to control elections to fill all vacancies. (See Debates, vol. 2, 1945-2194; vol 4, 5242-5955.)
13. Sections 148 and 167 in prohibiting the holding of city elections at same time with congressional elections and in even years refer only to elections for "full terms." Otherwise, it would be impossible in many cases, to conform to the provisions of sec. 152, requiring election to fill vacancies to be held at the next succeeding annual election. (*Berry v. McCollough*, 94 Ky., 247.)

AUGUSTUS E. WILLSON AND HELM & BRUCE OF COUNSEL ON SAME SIDE.

JUDGE HAZELRIGG DELIVERED THE OPINION OF THE COURT.

At the November election, 1893, one Jas. J. Shelley was elected to the office of tax receiver of the city of Louisville for the term of four years. Within a month after his

election he died, and his brother, the appellant, was appointed by the mayor and the general council to fill the vacancy.

At the approaching November election, 1894, the appellant became the Democratic nominee for the office, and the appellee the Republican nominee. The race resulted in the election of the appellee, but the appellant declining to vacate the office, this action was instituted against him by the appellee to prevent an alleged usurpation of the office and to have himself adjudged its lawful incumbent.

Judgment resulted for the appellee.

It is the contention of the appellant first, that notwithstanding his original belief that his appointment lasted only until the election of 1894, it, in fact, invested him with the office for the whole of the unexpired term, or if not, second, that it did so at least until the next regular election, at which, under the constitution, city officers could be elected, which would be in November, 1895.

His first proposition, stated generally, is that the constitution, whatever may be its provisions as to other offices and filling vacancies therein, expressly declares under the appropriate head of "Municipalities" that officers of cities and towns, other than certain ones not now necessary to mention, "shall be elected by the qualified voters therein, or appointed by the local authorities thereof, as the General Assembly may, by a general law, provide," and that such assembly "shall prescribe the qualifications of all officers of towns and cities, the manner in and causes for which they may be removed from office, and *how vacancies in such offices may be filled.*" (Section 160.)

That in the exercise of this right, the General Assembly provided (section 2904 Kentucky Statutes). that a tax receiver should be elected in November, 1893, by the quali-

fixed voters of the city of Louisville for the term of four years, and no special or other provision for filling the office in case of the death, removal, etc., of the receiver being made by the statute, the duty was imposed on the mayor (section 2791) "to fill, with the consent of the board of aldermen, all vacancies in executive and ministerial offices not otherwise provided for." That the mayor's appointment "to fill the vacancy in the office occasioned by the death of James J. Shelley" was therefore in all respects in conformity with the constitution and the statutes, and invested him with the office for the unexpired term. It is manifest that if there are no other provisions of the constitution regulating the filling of vacancies in city offices which are elective under the constitution, or become so by the action of the local authorities in virtue of some general law, then the argument of counsel for appellant must be conceded to be sound, for the power conferred by the General Assembly on the mayor "to fill all vacancies in executive and ministerial offices" would seem to fall clearly within the constitutional right given the General Assembly to prescribe "how vacancies in such offices may be filled." Or in other words, if the mayor may exercise this power unaffected by any provision of the law other than is found in the provisions of the constitution and statutes indicated, then the filling of the vacancy must be held to mean the filling of it for the entire unexpired term.

The section of the constitution relied on to authorize the regulation and control of these offices by the legislature is as follows:

"Sec. 160. The mayor or chief executive, police judges, members of the legislative boards or councils of towns and cities shall be elected by the qualified voters thereof: Provided, the mayor or chief executive and police judges of the

towns of the fourth, fifth and sixth classes may be appointed or elected as provided by law. The terms of office of mayors or chief executives and police judges shall be four years, and until their successors shall be qualified; and of members of legislative boards, two years. * * * But other officers of towns or cities shall be elected by the qualified voters therein, or appointed by the local authorities thereof, as the General Assembly may, by a general law, provide; but when elected by the voters of a town or city, their terms of office shall be four years, and until their successors shall be qualified. * * The General Assembly shall prescribe the qualifications of all officers of towns and cities, the manner in and causes for which they may be removed from office, and how vacancies in such offices may be filled."

And the statute enacted in the exercise of this constitutional authority reads thus:

"Section 2791. It shall be the duty of the mayor, * * * 4. To fill, with the consent of the board of aldermen, all vacancies in executive and ministerial offices not herein otherwise provided for."

The statute creating the office in question is as follows:

"Sec. 2904. There shall be elected by the qualified voters of the city at the time and places provided for the election of mayor, a tax receiver who shall collect all city taxes except such as are to be collected by the sinking fund. * * * He shall settle his accounts with the mayor, comptroller, auditor and treasurer on or before the last day of October in each year for the taxes for which bills have been placed in his hands for collection for the year; and if, through his fault, a quietus therefor is not held by said receiver on said day, the general council shall, by resolution, declare vacant the office of such receiver, and the vacancy shall be filled

by the general council in joint session, by *viva voce* vote, for the unexpired term."

So that, taking these provisions together, we have, it is contended, the constitutional investment of the General Assembly with the power to create the office of tax receiver and determine whether it shall be an elective or an appointive office, to prescribe the duties and qualifications of the officer, and to provide how vacancies therein may be filled.

We have, too, the exercise of that power by the General Assembly—the creation of the office, the prescription of the duties pertaining thereto, the enactment that it shall be an elective office, and the provision that a vacancy therein caused by removal for cause shall be filled by the general council for the unexpired term, and in other cases by the mayor; and thus is completed, according to the appellant's contention now under consideration, his title to the office in question.

We have thus elaborated the contention of learned counsel for the appellant on the point now involved, because we wish to be understood as fully appreciating its force. But while admitting the plausibility of the argument, we have reached a different conclusion.

We have seen that the soundness of the appellant's construction of the constitution depends on the existence or non-existence of other modifying or controlling provisions of that instrument. That section 152 thereof does affect and control the question involved we can not seriously doubt. This section is under the title "Suffrage and Elections."

Under this title the questions indicated are treated not with reference to any particular division or subdivision of

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the State, but the subjects sought to be affected are general and universal.

The qualifications of the voter as prescribed therein are of universal application. State elections, district elections, county, town and city elections are alike provided for. As for cities of a certain population, registration is provided. More than one election each year is not to be held in the State or in any city, town, district or county except as specially provided for. In such company we find section 152, which reads as follows:

“Except as otherwise provided in this constitution, vacancies in all elective offices shall be filled by election or appointment, as follows:

“If the unexpired term will end at the next succeeding annual election at which either city, town, county, district, or State officers are to be elected, the office shall be filled by appointment for the remainder of the term. If the unexpired term will not end at the next succeeding annual election at which either city, town, county, district, or State officers are to be elected, and if three months intervene before said succeeding annual election at which either city, town, county, district, or State officers are to be elected, the office shall be filled by appointment until said election, and then said vacancy shall be filled by election for the remainder of the term. If three months do not intervene between the happening of said vacancy and the next succeeding election at which city, town, county, district or State officers are to be elected, the office shall be filled by appointment until the second succeeding annual election at which city, town, county, district or State officers are to be elected; and then, if any part of the term remains unexpired, the office shall be filled by election until the regular time for the election of officers to fill said offices.

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"Vacancies in all offices for the State at large, or for districts larger than a county, shall be filled by appointment of the Governor; all other appointments shall be made as may be prescribed by law. No person shall ever be appointed a member of the General Assembly, but vacancies therein may be filled at a special election, in such manner as may be provided by law."

The question is, does this section apply to or affect the filling of vacancies in the elective offices of towns and cities? It seems to us to state the question is to answer it so far at least as those offices are concerned which are elective under the constitution. Certainly the filling of vacancies in some city or town offices is contemplated in the distinct and oft-repeated references in the section to elections "at which *either* city, town, county, district or State officers are to be elected."

There may be a difference of opinion as to how the words "the next succeeding annual election" are to be construed, whether referring to an election in the particular class of offices to which the one belongs in which the vacancy exists, and to fill which the election is to be held, or whether the office in which the vacancy exists may be filled at *either* a city, town, county, district or State election, succeeding the time when the vacancy occurs.

But that the filling of vacancies in elective offices in towns and cities is provided for in this section can not be doubted. But it is thought that the requirements of this construction of the section are met if we say that the "elective offices" named in the section are those which are required to be elected in express terms by the constitution, and not those which may become elective or not at the option of the General Assembly, and so reasoning, the conclusion is reached that vacancies in those offices which are not re-

quired to be elected by the organic law, are to be filled as may be prescribed by the General Assembly, under the provisions of section 160. It seems to us there are several objections to this construction.

By the terms of section 160, only mayors and police judges of the first, second and third classes are required to be elected by the qualified voters. The mayors and judges of all other towns and cities, and all other officers of any of the classes, may be elected or appointed as may be provided by general law, and in view of this it seems hardly probable that a law on the subject of vacancies, evidently intended to be a comprehensive and general one, should fail to include by far the greater number of instances where its application would be equally desirable. For the sake of uniformity, if for no other, it would seem that the language of the section "vacancies in *all* elective offices" should be held to include not only those offices which are declared to be "elective" under the express terms of the constitution, but also those which may become so by some general law. Moreover, it must be borne in mind that although the general law may make these offices elective by the qualified voters, the construction contended for allows the local authorities to fill the vacancy, not temporarily or until a succeeding election, but for the whole of the unexpired term. The present case illustrates the length to which the appointive term in an elective office may be stretched under the contention that forbids the application of section 152 to all elective offices.

Again, the framers of the constitution knew that by the same instrument in which they used the language "all elective offices" they had empowered the General Assembly to provide by general laws possibly for the election of all the offices of towns and cities in the Commonwealth save those expressly provided for in the constitution itself, and we

think it fair to conclude that in section 152 they had in mind the filling of vacancies in the offices to be thus made "elective."

Again, the language of section 160, relied on by the appellant, is not susceptible of the construction contended for.

The provision is: "The General Assembly shall prescribe the qualifications of all officers of towns and cities, the manner in and causes for which they may be removed from office, and how vacancies in such offices may be filled."

The provision by its very terms includes all officers of cities and towns, and if the construction contended for be adopted, the General Assembly may provide for the filling of vacancies by appointment if it please, in the offices of mayors and police judges of cities of the first, second and third classes as well as those of the remaining classes, though we have seen that section 152 requires at least that these elective offices shall be filled by appointment only until a succeeding annual election.

Whatever, therefore, the provision may mean, it does not mean what the language might import on its face. It is our opinion that the intention was to confer on the General Assembly simply the power to provide how the vacancies in these offices may be temporarily filled, and also by whom they may be filled.

So we find in section 152 this language: "Vacancies in all offices for the State at large or for districts larger than a county, shall be filled by appointment of the Governor." This language imports on its face the power of the chief executive to fill vacancies in offices for the unexpired terms thereof which we know he may fill only temporarily and until the next succeeding annual election after the happening of the vacancy.

The power given is not to fill the vacancy, in the ordinary

acceptation of the words, but to fill only the appointive part thereof.

By placing the sections in juxtaposition this construction becomes apparent:

"Sec. 152. * * * Vacancies in all offices for the State at large or for districts larger than a county shall be filled by appointment of the Governor."

"Sec. 160. * * * The General Assembly shall prescribe the qualifications of all officers of towns and cities, * * and how vacancies in such offices may be filled."

Both of these provisions apply only to the filling of the appointive part of the vacancy, and by the statute relied on (sec. 2791), the legislature conferred on the mayor only the power to appoint until the next succeeding annual election and not for the full term. Much, however, has been made of the language in section 152, "except as otherwise provided in this constitution," and it is contended that the provisions of section 160, and particularly that portion which confers the power on the General Assembly to prescribe how vacancies in city offices may be filled, furnish the exceptions to the general rule laid down in section 152.

We may observe that by other provisions of the constitution, the rule in section 152 is not followed in filling vacancies. Thus the Governor's office is filled in a different way, so also the offices of members of the General Assembly.

If, however, we insert the supposed exception in section 152, we shall see the fallacy of counsel's argument. The section would then in substance provide, so far as towns and cities are concerned, that "vacancies in all elective offices in towns and cities shall be filled by temporary appointment and then by election at the succeeding annual elections therein, except that the General Assembly shall prescribe how such vacancies shall be filled," which is a manifest absurdity

on its face. If, however, the words in section 160 be construed to give the General Assembly power to provide for filling such vacancies temporarily, all difficulty at once vanishes.

It is true that in section 152, after the provisions giving the Governor power to fill certain vacancies temporarily, we find this language: "All other appointments shall be made as may be prescribed by law," and this would seem to be broad enough to authorize the General Assembly to provide by law for the temporary filling of such vacancies not only in county and district offices, when the districts were not larger than a county, but also in towns and cities. So that, the clause in section 160 to the same effect would appear to be a repetition. But the clause in 160 is not to the same effect.

As we have seen, section 152 applies alone to elective offices, and the words "all other appointments" mean "all other appointments to fill vacancies in elective offices," but when the framers of the constitution came to provide for city officers in detail, they knew many of them would be appointive, hence the necessity of providing a mode of filling vacancies therein. The provision, so far as it again confers authority on the legislature to provide for filling vacancies in elective offices, was unnecessary, but the provision was necessary for other purposes, and no harm results if in making the necessary provision, the language used appropriately confers a power already elsewhere conferred.

The second contention of the appellant is that even if the office of tax receiver be an elective office within the meaning of the constitution, and a vacancy therein is to be filled as provided in section 152, yet the election to fill the vacancy could not be held until in November, 1895: First, because there was no election of city officers in November, 1894, and

that a fair construction of the section requires that the vacancy in any given office should be filled at the succeeding election at which officers of the same class are to be elected. We think the language of the section disposes of this contention. The vacancy is to be filled "at the next succeeding election at which *either* city, town, county, district or State officers are to be elected." To illustrate, we know of no elective office in the State save that of Governor in which if there was a vacancy more than three months prior to the election of 1895, there might not then be an election to fill it.

There will be at that time an election held in every county in the State for members of the General Assembly and for railroad commissioners, thus embracing the territorial limits of the State. Unless the territorial limits of the particular office to be filled were embraced by that of the nearest succeeding election, the rule might be different. For example a vacancy in a State office would not be filled at a succeeding election in which only city officers were to be elected. The second reason for the contention that the office of tax receiver could not be filled at the election of 1894, is that at that time members of Congress were elected, and section 148 of the constitution prohibits the simultaneous holding of city and congressional elections.

That section provides that "not more than one election each year shall be held in this State or in any city, town or district, or county thereof, except as otherwise provided in this constitution. All elections of State, county, city, town or district offices shall be held on the first Tuesday after the first Monday in November; but no officer of any city, town, or county, or of any subdivision thereof, except members of municipal legislative boards, shall be elected in the same year in which members of the House of Representatives of the United States are elected.

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"District or State officers, including members of the General Assembly, may be elected in the same year in which members of the House of Representatives of the United States are elected."

We think it manifest that this section, general in its nature, was intended to apply to the regular election of the officers of the classes named and not to elections for filling vacancies. Otherwise there would be a conflict between it and section 152 providing for the filling of vacancies. For not only in 1894 when congressmen were elected was there an election at which under the express terms of section 152 the vacancies in city offices might be filled, but hereafter in even years there will be elections in the appellate districts of the State and in the railroad commissioners' districts at which such vacancies may be filled if effect be given to the express language of section 152.

As there is no inhibition against the holding of district and State elections at the same time congressmen are elected, and as under section 152, vacancies in city and county offices may be held at such district and State elections, we conclude that section 148 applies only to the ordinary elections for full terms.

And so with respect to section 167, it is provided that in 1893, and thereafter as their *terms of office may expire*, city and town officers are to be elected as provided by law but only in odd years, the section manifestly applying to elections held upon the expiration of the regular terms of office.

It may be observed that in the main, the various legislative enactments for filling vacancies in the elective offices of the cities and towns of the Commonwealth conform to the construction adopted in this opinion. To the extent that they differ from it they may easily be adjusted.

The judgment below is affirmed.

CASE 31—AGREED CASE—MARCH 27.

Superintendent of Public Instruction v.
Auditor of Public Accounts.

APPEAL FROM FRANKLIN CIRCUIT COURT.

THE CONSTITUTION DOES NOT LIMIT THE USE OF THE COMMON SCHOOL FUND TO THE PAYMENT OF TEACHERS' of the common schools, and the legislature has the power to provide, as it has done in section 4371, Kentucky Statutes, that the expenses of the department of education of whatever character or kind shall be paid out of that fund.

WM. J. HENDRICK, ATTORNEY-GENERAL, FOR COMMONWEALTH.

No part of the common school fund can be used to pay any debt, obligation or demand of any kind whatsoever, except the salary of a qualified teacher of a common school, actually kept as required by law. (Present Constitution of Ky., sec. 184; Constitution of 1850, art. 11, sec. 1; *Collins v. Henderson*, 11 Bush, 74; Common School Laws, sec. 2; *Idem*, sec. 11.)

T. M. GOODKNIGHT FOR APPELLANT.

1. No part of the school fund can be properly appropriated by the legislature to the payment of any expenses connected with common schools, except the salary of a teacher. (*Collins v. Henderson*, 11 Bush, 75; Constitution of 1850, art. 11, sec. 1; Constitution of 1891, secs. 184, 186; Debates of Const. Conv. of 1891, vol. 3, pp. 4574 to 4584; *Idem*, vol. 4, pp. 4585 to 4607.)
2. Whatever may be the opinion of the court as to the limitations of the present Constitution on the power of the legislature, there is a more serious difficulty than the constitutional limitations, and, that is the limitations of the legislature as to the use of the school fund. Evidently the legislature intended that no part of the school fund should be used for paying any charges, except what goes to teachers and to salaries of superintendent of public instruction and his three clerks. (Common School Laws of 1891-2-3, secs. 8, 9, 10, 12, 14, 45, 23, 27, 28, 30, 31 and 33.)

JUDGE PAYNTER DELIVERED THE OPINION OF THE COURT.

The question arises in this case from a difference of opinion between the Auditor of Public Accounts and the Super-

intendent of Public Instruction as to the proper interpretation of section 184, of the constitution, which reads as follows: "The bond of the Commonwealth issued in favor of the board of education for the sum of one million, three hundred and twenty-seven thousand dollars, shall constitute one bond of the Commonwealth in favor of the board of education, and this bond and seventy-three thousand, five hundred dollars of the stock in the Bank of Kentucky, held by the board of education, and its proceeds, shall be held inviolate for the purpose of sustaining the system of common schools. The interest and dividends of said fund, together with any sum which may be produced by taxation or otherwise for purposes of common school education, shall be appropriated to the common schools and to no other purpose.

"No sum shall be raised or collected for education other than common schools until the question of taxation is submitted to the legal voters and the majority of the votes cast at said election shall be in favor of such taxation: Provided, The tax now unpaid for educational purposes, and for the endowment and maintenance of the Agricultural and Mechanical College, shall remain until changed by law."

It is insisted by the Superintendent of Public Instruction that the fund arising from the sources therein named, for the purposes of common school education, can only be paid to the teachers of the common schools and for no other purpose.

On the other hand, it is contended by the Auditor of Public Accounts, that the expenses of the State department of education, of whatever character or kind, shall be paid out of the resources of the common school fund.

By section 4371, Kentucky Statutes (Common School Law), it is provided in effect that "the expenses of the de-

partment of education, of whatever character or kind," should be paid out of that fund.

By section 4385 it is provided that the salaries of the Superintendent of Public Instruction and his clerks "are to be paid monthly out of the common school fund." The superintendent is required to make a biennial report, to prepare suitable blanks for reports, registers, certificates, notices, etc., which are required to aid the officers and persons interested with the execution of the provisions of the school law.

He is required to biennially edit the school laws and annually to have them, together with abstracts of certain decisions, etc., published for distribution, all of which is done in aid of and for the benefit of the common schools.

It would be impossible to have a wise and effective system of common schools without a department of education to give general direction and superintendence to them. There seems to be no duty with which the department is charged which is not essential to the management of the system.

The Superintendent of Public Instruction has charge of the pro rating and distribution of the common school fund. He, together with assistants selected by him, prepares the series of questions for the examination of teachers, thus testing their qualifications for the position of teacher in a common school.

It seems to us, without this executive head, the entire system would be in the greatest confusion and would fall far short of the expectations of the friends of popular education.

While we recognize as correct the definition of a common school as given in *Collins v. Henderson*, 11 Bush, 74, which is a school actually taught by a teacher, qualified according to law, to teach in a district laid out by authority

of the school laws and under the control of trustees elected under those laws, yet we can not concur in the view that the constitution allows the common school fund to be paid only to the teachers of such schools.

If such a limitation had been intended to be placed on the expenditure of the fund it would have been so written in the constitution. It would have been quite easy to have done so.

If any fear exists that the legislature might at some time not act wisely in passing laws relating to the expenditure of the common school fund, that could not justify this court in giving the narrow interpretation to the constitution contended for by the Superintendent of Public Instruction. While the Attorney-General in a very able and elaborate review of the question sustains the position taken by the Superintendent of Public Instruction, believing as we do that the support of the department of education is essential to make the success of the common schools complete, thus making effective and beneficial the labors of the teachers, we are unable to conclude that the meaning of the constitution is that the fund be appropriated so as to give all of it to the teachers of the common schools.

Did we entertain a doubt as to the proper interpretation of the section of the constitution in question we would resolve it in favor of that given it by the legislature—that branch of the State government charged with responsibility of the proper appropriation of the common school fund.

The court did not hold in *Collins v. Henderson supra*, that the common school fund could only be appropriated to pay the teachers of the common schools. We must presume that the constitutional convention knew the extent to which this court had gone in its interpretation of the provision of

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the former constitution relating to the common school fund, and if it had intended to restrict the use thereof to the sole purpose of paying teachers it would have so declared in terms. We are of the opinion that the legislature had constitutional authority to charge the common school fund with the payment of "the expenses of the State department of education of whatsoever character or kind," in aid of common schools.

Judgment affirmed.

CASE 32—INDICTMENT—MARCH 29.

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APPEAL FROM HARLAN CIRCUIT COURT.

97	184
106	221

97	184
110	110
110	367
111	533
111	544

97	184
123	6
123	417

97	184
129	506

97	184
132	52

1. CONTINUANCE.—When the accused seeks a continuance on account of the absence of a material witness, in determining whether he has used due diligence to secure the attendance of the witness, the fact that the Commonwealth had the witness recognized to appear should have the same effect as if the witness had been recognized at the instance of the accused, and no further diligence is necessary to be shown.
2. HOMICIDE IN DEFENSE OF SELF AND FAMILY.—Upon the trial of appellant for murder, there being testimony tending to show that his dwelling was attacked by deceased with the intention of having carnal knowledge of his wife, or of carrying her away for that purpose, the court should have instructed the jury that if they believed from the evidence that at the time of the killing the accused believed and had reasonable grounds for believing that the deceased was then and there about to have carnal knowledge of the wife of the accused against his will, or was then and there about to abduct her, or by force or menace sought to induce her to leave her husband for carnal or other purposes, then the accused had the right to protect himself and wife from such wrong by any means or force necessary or apparently necessary to that end, even to the taking of life.
3. IMPEACHMENT OF DEFENDANT AS WITNESS.—When the accused

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goes upon the witness stand to testify for himself, he may be subjected to the same kind of cross-examination as any other witness and be impeached as any other witness, but he can not be compelled to give evidence against himself, except as to the charge under consideration, and, therefore, can not be required to admit the commission of other offenses which would subject him to punishment, presentment or infamy.

4. **EVIDENCE—CRIMINATING TESTIMONY.**—Upon the trial of appellant for the killing of one person he should not be compelled to testify as to who killed certain other persons, not only because he can not be required to give evidence against himself, but because such testimony is not relevant.
5. **DYING DECLARATIONS.**—Where it appears that the deceased made a dying declaration which was reduced to writing and signed by him, parol testimony as to his statement is not competent in the absence of testimony to show that it is not within the power of the Commonwealth to produce the writing. But where the writing is produced and can not be admitted as evidence because the statements are irrelevant, or it is otherwise inadmissible, the court should admit parol testimony to prove the dying declaration.
6. **SAME.**—The writing is the best evidence, although not sworn to. It is sufficient if it is signed by the deceased.

N. B. HAYS, G. A. EVERSOLE, N. J. SAYLOR AND S. N. FRENCH
FOR APPELLANT.

1. The court erred in refusing a continuance. (*Adair v. Cooper*, 25 Texas, 548; *Boone v. Hilton*. (S. C.) Const., 198; *Allcorn v. Raftery*, 4 J. J. Mar., 220; *Holmes v. Dobbins*, 19 Ga., 630; *Montgomery v. Ins. Co.*, 18 La. Ann., 227.)
2. As the dying declarations of the deceased were reduced to writing, the writing was the best evidence, and its absence not being accounted for, it was error to admit parol testimony as to its contents. (*Greenleaf on Evidence*, vol. 1, sec. 161; *Roscoe's Criminal Evidence*, 35, 97; *State v. Sullivan*, 51 Iowa, 142; *State v. Tweedy*, 11 Iowa, 350; *Commonwealth v. Haney*, 127 Mass., 435; *People v. Glenn*, 10 Cal., 32; *Collier v. State*, 20 Ark., 36; *State v. Patterson*, 45 Vt., 308; 1 *Wharton's Am. Crim. Law*, 5th and rev. ed., p. 340, sec. 679; 47 *Ohio St.*, 358; *Greenleaf on Evidence*, p. 231, sec. 161; *Hines v. Commonwealth*, 90 Ky., p. 64.)
3. Defendant was on trial for the killing of Shackelford alone, and it was error to admit testimony as to the killing of other persons, such testimony not being competent as a part of the *res*

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gestae. (1 Bouvier's Law Dictionary, p. 614; 1 Greenleaf on Evidence, sec. 108; Roscoe's Criminal Evidence, p. 79, note 1.)

4. The court erred in not giving the instructions asked by defendant.

WM. J. HENDRICK, ATTORNEY-GENERAL, FOR APPELLEE.

Under the facts proved in this case, I am of the opinion that the instruction offered by defendant and refused by the court should have been given.

JUDGE PAYNTER DELIVERED THE OPINION OF THE COURT.

The appellant was indicted in the Harlan Circuit Court charged with the murder of Hiram Shackelford. He was tried, found guilty of voluntary manslaughter and his punishment fixed at confinement in the penitentiary for a period of five years.

It is insisted that the judgment should be reversed because, (1) the court erred to his prejudice in overruling a motion for a continuance of the case; (2) the court erred in failing to properly instruct the jury and give to it the whole law of the case; (3) the court erred in allowing witnesses to prove the declaration of the deceased, which was claimed to be his dying declaration; (4) the court erred in compelling the accused to state on cross-examination that he had killed James and Lincoln Middleton.

To the several rulings of the court of which accused is complaining proper exceptions were taken.

We will consider the questions in the order stated.

The affidavit which the accused filed for a continuance disclosed fully the facts which the absent witness, Charles Parrott, would prove when given time to procure his attendance. No doubt can exist as to the relevancy and materiality of the evidence, and we deem it unnecessary to make a statement of the facts of the case together with the facts which the absent witness will prove, in order to

illustrate its importance to the accused to enable him to have a fair trial.

The only question is as to whether proper diligence was used to procure attendance of the witness.

The accused stated in his affidavit that the witness had been recognized at the instance of the Commonwealth to appear as a witness for her, at that term of the court, on the trial of the accused; that the witness had testified on examining trial of accused for the Commonwealth; that the affiant had learned within the week preceding the date of filing the affidavit the witness would prove facts (fully stating them) which were not disclosed by the witness on the former trial; that since learning the absent witness would prove such facts, affiant had been confined in jail, his attorney upon whom he relied was living in another county, and he had no opportunity to procure the attendance of the witness. Aside from the fact that the Commonwealth had the absent witness recognized to appear and testify in her behalf at that term of the court against the accused in this case, we think the affidavit disclosed a state of facts which entitled the accused to a continuance.

When the Commonwealth has a witness recognized to appear at a term of the court and testify in her behalf it is not necessary for the accused to have such witness recognized to appear and testify for him or to have a subpoena issued for or served on him.

The Commonwealth having taken the necessary steps to procure the attendance of the witness, the accused has the right to rely upon the good faith of the Commonwealth and to expect the attendance of the witness.

In considering the question of diligence on a motion for a continuance by the accused on account of the absence of a

witness, the fact that the Commonwealth had such witness recognized should have the same effect as if he had been recognized at the instance of the accused.

So far as the court gave instructions to the jury, they were correct, as they were the instructions usually given in cases of homicide, but in view of the testimony of the defense the court did not give the entire law of the case to the jury.

The testimony adduced by the accused tends to prove that the deceased and others came to the house of the father-in-law of the accused where the accused and his wife were living, forced the kitchen door open and the deceased came in with a pistol in his hand, entered the room, looking all around, and discovering that the accused and his wife were in the loft, where they had gone to avoid the deceased and his party, endeavored to force them down in the room below. Failing in this then the deceased tried to get the accused to leave his wife and allow the deceased to go where she was in the loft. Another one of the party who accompanied the deceased uninvited, came to the loft where the accused and his wife were, and gave them to understand that they had better do as the deceased wanted them to do, intimating that it would be hazardous for them not to do so, saying that "they knew Hiram Shackelford and that they had better come down."

During this time the accused was advising the parties to go away. Failing to come down, the deceased fired a pistol through a crack into the loft and grazed the arm of the wife of the accused.

The proof also tends to prove that the deceased came to the house to get the wife of the accused and take her away with him; that on the day of the killing, and just before going there, the deceased had tried to hire a party to go to the house where the accused and his wife were and where the

killing took place and get the wife of the accused to come to the deceased.

The testimony tends to prove that the deceased attacked the dwelling, struck the kitchen door and forced it open, and entered with a weapon in his hand, and as the accused lived there he had the right to defend the dwelling, as the law regards an attack on it as equivalent to an assault upon his person, for a man's home is his castle. He had the right to use the force necessary to resist the attack, even to the taking of life.

If, then, one has the right to defend his castle even to the taking of life, how much greater and more sacred should be the right to protect and defend the person of his wife who is in the dwelling when the attack is made, not only from death or great bodily harm, but from any attempt to abduct her, or by force or menace induce her to leave her husband for carnal or other purposes?

To protect and defend the wife under such circumstances is not only the right but the duty of the husband, and in doing so he may use such force as is necessary or apparently necessary even unto the taking of life.

In addition to the instructions which were given the jury, the court should have told them that if they believe from the evidence, beyond a reasonable doubt, that the accused shot and killed the deceased, and they further believe at the time of the killing the accused believed and had reasonable ground for believing, that the deceased was then and there about to have carnal knowledge of the wife of the accused against his will, or was then and there about to abduct her or by force or menace sought to induce her to leave her husband for carnal or other purposes, then the accused had the right to protect himself and wife from such wrong by any means or force necessary or apparently necessary to that end,

even to the taking of life, and if the jury believe from the evidence, that the accused believed that he was then and there in immediate danger of such wrong or wrongs at the hands of the deceased, and that he shot and killed deceased to prevent such act, and that in so doing he used no other or greater force or means than were to him apparently necessary for that purpose, they should acquit the accused.

The accused became a witness in his own behalf, and after detailing what he claimed were the facts with reference to the killing of Hiram Shackelford, for whose killing alone he was being tried, the court compelled him to detail facts with reference to the killing of James and Lincoln Middleton, thus forcing the accused to admit that he had killed James and probably Lincoln Middleton. They were killed at the same place where Shackelford was killed and immediately afterward. To admit these facts certainly was calculated to influence the action of the jury in its consideration of the case on trial.

When the accused goes upon the witness stand to testify for himself he may be subjected to the same kind of cross-examination as he would be were he not a defendant. His testimony can be impeached in the same manner as that of any other witness. He is subject to the same rules and is not deprived of any of the privileges that belong to other witnesses. He goes upon the stand to admit or deny his guilt, or to give such facts as may excuse or mitigate the offense, or such as may convict him of the offense with which he is charged, as the facts which he discloses may establish. His testimony can only relate to the offense with which he stands charged.

It is a rule that a witness is not bound to answer any question which would tend to subject him to punishment, presentment or infamy. Under the bill of rights he can not

be compelled "to give evidence against himself," but when he becomes a witness for himself in a criminal prosecution he waives that right so far as the charge under investigation is concerned. The fact that he does so waive it does not give the Commonwealth the right to compel him to admit the commission of other offenses which would subject him to punishment, presentment or infamy.

If this was done it would be in utter disregard of the bill of rights, and in many instances deter persons accused of an offense from going on the stand as a witness for himself, as a forced confession of another offense might subject him to punishment far greater than the charge under investigation.

For another reason the accused should not be compelled to testify as to who killed James and Lincoln Middleton, as it is not relevant and is prejudicial to the rights of the accused in the trial of the indictment charging him with killing Hiram Shackelford.

The remaining question to be reviewed is as to the action of the court in allowing James Shackelford and Geo. Lee to tell what the deceased said as to how the difficulty and shooting occurred. Both witnesses proved that the deceased made a dying declaration which was reduced to writing and signed by him. Shackelford testified he did not remember all that was in the written statement and Lee that he did not remember but little it contained. Neither of them attempted to testify as to what it contained, neither were they asked to state what it contained, but were allowed to prove what the deceased had said as to how the killing occurred and that the statements were made by the deceased *in extremis*.

The Commonwealth did not account for the absence of the declarations of the deceased which had been reduced to

writing except that James Shackelford said "he brought same and delivered them to the grand jury and have never seen them since." There was no proof that the writing was lost or mislaid or was not in existence, nor in the power of the Commonwealth to produce it. In such a case did the Commonwealth have the right to prove dying declarations of the deceased? We think not. It was not the best evidence of which the case in its nature was susceptible. It is essential to the pure administration of justice that the best evidence should be produced.

The writing which contained the dying declaration was primary evidence. It afforded the greatest certainty of the facts in question. The Commonwealth should not be permitted to introduce the secondary evidence until it is shown that it is not within its power to produce the primary.

"If the declaration of the deceased, at the time of his making it, be reduced into writing, the written document must be given in evidence, and no parol testimony respecting its contents can be admitted; and if a declaration *in articulo mortis* be taken down in writing and signed by the party making it, the judge will neither receive a copy of the paper in evidence nor will he receive parol evidence of the declaration." (1 Wharton's Crim. Law, sec. 679.)

Russell on Crimes, vol. 2., p. 762, lays down the same doctrine.

In *Hines v. Commonwealth*, 90 Ky., 64 this court said: "It seems to us that when a dying declaration is made and reduced to writing and sworn to by the declarant, as in this instance, it, under the rule that the best evidence the case admits of must be produced, should, if within the power of the party, be produced."

It is not necessary that the writing should be sworn to by the deceased. If it is signed by him it is sufficient.

The rule should be extended so if in any case when the writing produced as the dying declaration of the deceased can not be admitted as evidence because the statements are irrelevant or otherwise inadmissible, then the court should admit parol evidence to prove the dying declaration. If it is not within the power of the Commonwealth to produce the written dying declaration then parol evidence for the purpose is admissible.

We do not pass upon the other questions raised, for the case must be reversed for the reasons already given.

Judgment reversed with direction for further proceedings consistent with this opinion.

CASE 33—INDICTMENT—MARCH 29.

Starr v. Commonwealth.

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122	791

APPEAL FROM MARTIN CIRCUIT COURT.

1. DYING DECLARATIONS.—A statement is not admissible as a dying declaration unless it was made under a sense of impending death. And the statements of the deceased that "he would not get well," and that he "could not stand it much longer" are not sufficient to show a conviction that death was impending, especially in view of the fact that he had lived nearly seven months after being shot.
2. DYING DECLARATIONS should be restricted to the act of killing and the circumstances immediately attending it, and forming part of the *res gestae*.

The declaration of the deceased in this case that he did not know what made accused shoot him, that they had always been good friends, does not conform to that rule, and its admission was prejudicial.
3. EVIDENCE.—It was error to refuse to permit defendant to testify that at the time the shot was fired he believed he had no other means of escape.

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4. IT WAS ERROR TO QUALIFY THE INSTRUCTION AS TO SELF-DEFENSE by telling the jury, in effect, that they could not acquit on that ground if they believed that defendant "brought on the difficulty" and sought the life of deceased, or to do him great bodily harm, there being no testimony on which to base such an instruction.
5. RIGHT OF PEACE OFFICER TO CARRY ARMS.—As it appeared that on the day of the homicide the accused, as constable, had been engaged in making the arrest of certain parties charged with crime, and was attending the examining trial that evening, and on that account he had borrowed the pistol with which he shot deceased; and it also appears that on the very night of the killing he was engaged in attempting to keep the peace as an officer, the court should have given the instruction asked on the subject of the right of an officer to carry arms for his protection while in the discharge of his duties.

KIRK & KIRK, T. S. KIRK, T. W. NEWBERRY AND A. COPLEY
FOR APPELLANT.

1. Two of the jurors were legally disqualified, they being indicted for crime at the time they were accepted as jurors. (Henderson v. Bradshaw, 4 Bibb, 45; Dana, 203; 1 B. Mon., 214.)
2. The court should swear the sheriff to keep the jury together, &c., before they should be permitted to retire, which the court did not do in this case. (Criminal Code, sec. 245.)
3. Dying declarations to be competent must be made *in extremis*, must be a part of the *res gestae*, and must undertake to detail the facts and circumstances of the killing. (9 Am. and Eng. Enc. of Law, p. 676; Pace v. Commonwealth, 89 Ky., 204.)
4. The defendant had the right under the law to testify that he believed that he had no other safe or apparently safe means of escape but to fire the fatal shot, and the court erred in refusing to allow him to do so.
5. The defendant was entitled to a simple instruction upon the law of self-defense. (Cook v. Commonwealth, 86 Ky., 663; Allen v. Commonwealth, *Idem*, 643.)
6. Constables and peace officers have the right when in the discharge of their official duties to carry upon and about their person concealed deadly weapons, and the court should have so instructed the jury.
7. The Commonwealth's Attorney should not make any statement in the presence of the jury which is directly in conflict with the

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evidence and thereby prejudice the rights of the accused, which was done in this case. (*Cook v. Commonwealth*, 86 Ky., 663.)

WM. J. HENDRICK, ATTORNEY-GENERAL, FOR APPELLEE.

1. The majority of the grounds for new trial are covered by sec. 281 of the Criminal Code as those not subject to exception under our law.
2. The instructions asked with reference to the right of constables to carry concealed deadly weapons was not a correct statement of our law, which is contained in sec. 1313 of the Kentucky Statutes.
3. The dying declaration of the deceased was properly admitted.
4. There was no misconduct on the part of the Commonwealth's Attorney in his argument to the jury.

JUDGE HAZELRIGG DELIVERED THE OPINION OF THE COURT.

William Starr, a constable of Martin county, was tried and convicted of manslaughter under an indictment charging him and one Underwood, the police judge of Eden, the county seat of that county, with the murder of John James. On appeal from the judgment of conviction he complains of numerous errors. We shall notice only such as appear to be of a serious nature. The deceased was drinking heavily and on the night of the killing was boisterous and quarrelsome. While passing through the streets of the village, and in the hearing of all, he amused himself by singing songs of the vilest character, the words of which were most indecent and vulgar. This was in the hearing of the police judge, town marshal and the appellant. The police judge suggested that the marshal arrest the offender, but that official replied that he would not do so as long as he harmed no one, but when he became sober he would summon him and have him fined. The deceased became involved in a difficulty with one Cassedy, and again with the marshal, kicking the latter's lantern out into the street. After quiet had been restored,

Underwood, Starr, and others went over to Price's, where there was a wedding, and were engaged in general conversation in a crowded room when the deceased came in. What there occurred is testified to by a large number of witnesses whose statements, though not altogether tallying, are less contradictory than might be expected under the circumstances.

The fact that the deceased, with a large open knife in his hand, was making at the appellant when the latter fired, is testified to by nearly all the witnesses, both for the State and for the defendant. Nevertheless, if a fair trial has been accorded the accused, we are to assume, from the finding of the jury, that he was not acting in his necessary self-defense when he fired the fatal shot. The error which most seriously affected his substantial rights and deprived him of such a trial, the appellant urges, is that of the court in admitting the sister and brother-in-law of the deceased to detail to the jury their brother's alleged dying declaration. The sister testified that she heard her brother say, a short time before his death, that "he would not get well," that he "could not stand it much longer."

The question is: Did this language indicate a sense of *impending* death? It does not appear that the deceased had been told that he could not recover, and he had lived for nearly seven months after being shot. The language seems to us rather that of discouragement than of a conviction of impending death. In *Vaughn v. Commonwealth*, 86 Ky., 431, the language of the declarant was, "he believed he would have to die," and it was held insufficient to constitute a basis for the introduction of the alleged "declaration." "It is the impression of almost immediate dissolution, and not the rapid succession of death, in point of fact, that renders the testimony admissible."

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The mere belief of the declarant that he will not get well, but that he will ultimately die from his injuries, is not sufficient to admit his declaration. (Greenleaf on Evidence, vol. 1, sec. 158.)

The declaration of the deceased was that "he did not know what made Starr shoot him, that they had always been good friends, that he hated to die and leave his family." If the deceased did not know "what made Starr shoot him," the inference necessarily is that he had given the accused no cause for doing so. It was as if he had said: "I am wholly blameless, and one who has always been my friend shot me without my knowing why he did so."

We can not say that this evidence did not influence the jury. It was certainly calculated to arouse their prejudices and inflame their passions against the accused as one who had shot his friend without cause. We think it was incompetent and prejudicial.

The testimony of the brother-in-law is that the deceased talked to him on the day before he died about dying, and said "he could not get well, that there was a boy he hated to die and leave, that he hated to die and not know one thing: he would like to know what made Bill Starr shoot him, and that he did not believe he would if Gus Underwood had not have told him to do so." Here we have no better foundation for the testimony than that laid by the evidence of the sister.

The statement of James that "he would not get well" is far from indicating that he was then resting under a solemn conviction that his dissolution was immediately at hand or closely approaching. The statement, too, that he did not know why Starr had shot him is repeated and thus emphasized before the jury. In addition to this the jury are told in effect by the deceased that the accused had shot him for no reason except that he was told to do so by Underwood.

Such a statement, it seems to us, might have strongly prejudiced the jury against the accused, and if they believed it, would properly have influenced them to disregard his plea of self-defense.

In vain might the defendant attempt to show that he shot the deceased only after he was advancing on him in a drunken frenzy, if the minds of the triers are once filled with the declaration of a dying man, so admitted before them by the court, to the effect that there was no cause for the shooting save an order to do it by an accomplice. Even if the proper basis for the proof had been made, yet the testimony is incompetent, as detailed by the sister and the brother-in-law. In *Leiber v. Commonwealth*, 9 Bush, 11, and *Collins v. Commonwealth*, 12 Bush, 271, it is held that the general rule is that dying declarations are only admissible in evidence where the death of the deceased is the subject of the charge, and the circumstances of the death the subject of the declarations, and such evidence should be admitted only upon the ground of necessity and public policy, and should be restricted to the act of killing and the circumstances immediately attending it and forming part of the *res gestae*.

In this case the act of killing was shown by a number of witnesses and admitted by the defense. The declaration was not even directed to that act, and if it had been, it was wholly unnecessary. The statements do not conform in any particular to the rule laid down in the cases cited.

The question was asked the accused, "Did you or not believe at the time the shot was fired that you had no other means of escape but to fire the fatal shot?" but objection to it was sustained, and this is another ground of complaint. In *Williams v. Commonwealth*, 90 Ky., 596, such testimony was held to be competent as rebutting the unfavorable inference that might be drawn if the accused, having the

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chance to do so, failed to state his belief that he was in danger; and so it appears to us as to this testimony.

The instructions are also complained of. The first one submits to the jury the law of murder and is accurate. The second one is on the same subject, but the conviction of the accused of the crime of murder is based in part, and somewhat confusedly so, on the belief of the jury that Underwood was present at the killing and aided, encouraged and advised Starr to do the shooting. The proof disclosed that Underwood was present, and some witnesses testified that during the difficulty he said: "Put it to him;" and while Underwood swears that he only cried out to the town marshal to "arrest him," or "arrest them," yet it was error to predicate the guilt of the accused upon the conduct of Underwood. Such an instruction, in view of the admission of the declaration of the accused that Starr had shot him only because Underwood had told him to do so, must have been extremely misleading and prejudicial.

The third instruction correctly gave the law of manslaughter, and the fourth invested the jury with the usual discretion as to convicting for the lesser crime. The fifth told the jury that mere threats made by James to kill Starr did not justify the latter in killing the former unless Starr believed that James was about to execute his threats and take his life. This instruction is confusing and ought not to be given. The sixth instruction properly gave the law of self-defense except for the words of qualification appended to it: "Unless the jury should believe that the defendant, William Starr, brought on the difficulty with James, or aided or assisted or encouraged Underwood to bring on the difficulty with said James, and sought his life or to do him great bodily harm or injury,

and if they so believe they can not acquit on the ground of self-defense and apparent necessity."

There is no testimony on which to base such an instruction in this case. Every witness to the transaction testifies that James commenced the trouble in the room where the killing occurred, and if the instruction pointed to any act of the accused outside of that room which might have "brought on" the difficulty, he seems to have abandoned it before the shooting. The simple instruction on the law of self-defense, offered by counsel for the accused, should have been given.

It appears that on the day of the homicide the accused as constable had been engaged in making the arrest of certain parties charged with crime, and was attending the examining trial that evening. For this reason he had borrowed of one Price the pistol with which he shot the deceased. It also appears that he was engaged on the very night of the killing in attempting to keep the peace as an officer. For these reasons, we think the court should have given the instructions asked on the subject of the right of an officer to carry arms for their protection while in the discharge of their official duties.

Other errors are insisted on, involving the competency and conduct of certain jurors, the speech of the attorney for the Commonwealth etc., which do not seem to be of any significance.

For the reasons indicated, however, the judgment is reversed with direction to grant the defendant a new trial and for further proceedings consistent with this opinion.

CASE 34—PETITION EQUITY—MARCH 29.

Taylor, &c v. Jones, &c.

97 201
120 670

APPEAL FROM CLARK CIRCUIT COURT-

1. **INDEBTEDNESS OF DEVISEE TO TESTATOR'S ESTATE.**—Where a testator devised his entire estate to his widow for life, remainder to his six children, authorizing the widow to give any child immediate possession of so much of the estate as she might see fit, not to exceed one-sixth to any child, and requiring each child to account in the final division of the estate for what he had received from the widow in the exercise of this power, the testator being liable as surety for one of his sons, the other children had the right to require that that son's interest should be subjected to the payment of the debt for which the testator was bound as his surety. It was, therefore, error to require that debt to be paid out of the general estate of the testator and then to set apart one-sixth of the estate, after the payment of debts, as the share of the son who was primarily liable for that debt, and direct the payment of that share to his assignee, he having made an assignment for the benefit of his creditors. That part of the estate subjected to the payment of this debt should be treated as an advancement made by the widow to the son who was primarily liable for the debt, and he can have no further interest to be subjected by his creditors, the part of the estate thus subjected amounting to one-sixth of the whole.
2. **ASSIGNEE FOR CREDITORS NOT A BONA FIDE PURCHASER.**—Neither the assignee nor the creditors under a deed of assignment are bona fide purchasers for value within the meaning of sec. 2087 of the Kentucky Statutes, which provides that estate aliened by the heir or devisee before suit brought shall not be liable to creditors in the hands of a bona fide purchaser for value unless suit is instituted within six months.

BRONSTON & ALLEN FOR APPELLANTS.

The share of Roger Jones, Jr., in the real estate of the testator should be first applied to the payment of the debt he owes the estate. (*Brown's Admr. v. Mattingly*, 12 Ky. Law Rep., 869; *S. C. 91 Ky., 275*; *Waterman on Set-off.*, 234.)

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H. M. BUFORD FOR APPELLEE.

No brief in record.

JUDGE GRACE DELIVERED THE OPINION OF THE COURT.

The question made on this appeal involves the interest of Roger W. Jones and his assignee in his father, Roger Jones' estate, and involves a construction of the will of the father which has once before been in this court for consideration, and the record then made being part of this same suit is now considered in this case. That portion of the will of Roger Jones pertaining to the controversy reads as follows:

"I will and devise all my property of every kind and description, real, personal, and mixed, unto my beloved wife, Lucy M. Jones, in trust, to be by her managed and controlled during her natural life, for the joint benefit of herself and my six children (naming them) with power in my wife to give immediate title and possession of such portion of any of said property as she may think fit, to any one or all of said children, at such time or times as she may think fit. *Provided*, the portion given to any one of said children shall in no event exceed in value one-sixth of my entire estate; and at the death of my said wife, I desire that each of my six children have an equal share of my entire estate, taking into consideration the value of what any one may have received from my said wife by virtue of the power herein conferred upon her.

"Should any one of my children to whom a portion of my property shall have been given in the exercise of the power conferred upon my said wife, die before the age of twenty-one years, and without issue, I will that the property so given to him or her shall revert to my said wife to be held and controlled by her in the manner and subject to the restrictions and limitations and power under which it was

held before it was so given. At the death of my wife the said property to be divided equally among my surviving children as herein provided."

Under this will, on former appeal, this court held that the wife, Lucy M. Jones, took a life estate in the whole of said property with right to use and enjoy the rents and profits of the realty. By a further clause, "the decedent appointed his wife the sole executrix of his estate without bond."

This will was written in 1889. The testator died some time in the summer of 1890 and his will was duly probated by the county court in Clark county, the same being the county of his residence, on the 25th of August, 1890. Previous to the time of the testator's death, he became surety for his son, Roger W. Jones, to the Clark County National Bank in the sum of six thousand dollars or more. In April, 1891, two of the heirs and devisees of decedent, Roger Jones, filed their suit in the Clark Circuit Court against Mrs. Lucy M. Jones, the widow and executrix of said estate, the other heirs and devisees, and the Clark County National Bank, setting up the fact hereinbefore recited, of the liability of the estate to the bank for some six thousand dollars for and as the surety of his son, Roger W. Jones; setting out some other debts and praying for a settlement of the estate and for an equitable adjustment of the same with reference to the several heirs; setting out also that the estate was liable as the surety of another heir, Thomas Jones, for some \$2,400, and alleging the insolvency of the personal estate to pay its liabilities, but affirming the liability of the several interests of Thomas Jones and Roger W. Jones to be first sold to pay the several sums for which decedent's estate was liable, and praying for all other general and proper relief.

Taylor, &c v. Jones, &c.

In July, 1891, Roger W. Jones, the son, becoming insolvent, made his deed of assignment of all his property for the benefit of all his creditors, both he and his assignee being made parties to this suit. Finally there was presented to the court for decision on the pleadings, the question as to the interest of Roger W. Jones in his father's estate, and whether that interest should be first sold to pay the debts for which his father, Roger Jones, was liable to the bank aforesaid, as surety, and then exhaust the interest of Roger W. Jones in his father's estate, or whether his father's estate generally should first be compelled to pay this debt to the bank, and then turn over to the assignee of Roger W. Jones still a full sixth in the remainder of the estate of decedent. And on this question the lower court decided in favor of the assignee of Roger W. Jones' estate, and having taken proof of the debts against decedent's estate, including this six thousand dollars due to the bank as surety for Roger W. Jones, rendered a decree for a sale of so much of the land of decedent as would be sufficient to pay same, interest and cost; and also declared and adjudged that after this was done the assignee of Roger W. Jones was entitled to one-sixth of the remainder of decedent's estate, of every kind. Of this judgment the other heirs and devisees of Roger Jones complain and prosecute this appeal.

In that judgment we think the court below in error. Without reciting again the clauses in the will of Roger Jones, deceased, it will be observed that he groups his whole property, real, personal and mixed, together, and speaks of it and devises it as one estate, not leaving it severable as real estate, and personal estate, which, under our statutes, in case of an intestate, would go, the realty to the heir-at-law, and the personalty to the legal representative for adminis-

tration, after which the surplus only would go to the heirs.

It further is manifest by the several provisions of the will that the leading intent and purpose in the mind of the testator was to declare and to preserve, in any contingency, perfect equality between his several children; and that while authorizing the wife to pass the immediate title and possession of any part of the estate to any one or more of his several children, yet providing that in no event should the amount so given off or set apart by his wife exceed in value one-sixth part of his estate. And again, providing that, after the death of his wife, this same equality should be maintained in the distribution between his children, and specially saying "that this divisor should be by taking into consideration the value of whatever estate any one (of my children) may have received from my wife, by virtue of this power, herein conferred upon her." *Equality* being the leading idea in the mind of the testator, and making each heir in the final distribution of his estate account for whatever his wife may have given off to each, we deem it immaterial whether this advancement to any one heir was made voluntarily by the wife under or by virtue of this power, or whether she was compelled under the law and by the decree in this case to pay the debts of any one of the heirs (as Roger W. Jones) to the full interest of such heir in the estate. When that is once reached in either mode, then the will of the testator prohibits any further interest being given, and, by necessary implication, being taken by law for any purpose, under any title or claim against Roger W. Jones. The limit has been reached when he receives, either voluntarily or when his creditors exhaust, his one-sixth interest in the estate of his father. Having imposed this legal obligation on his father's estate by obtaining his signature to his debts as his security, which debts he leaves

unpaid, and to be paid by his father's estate, and to an amount equal to or exceeding one-sixth of said estate, he has nothing left to pass, by assignment or otherwise, to his creditors. Having no equitable claim on his father's estate for anything further, he can pass nothing by his deed of assignment to his assignee.

This we regard as the true equitable rule, and this court so announced in the case of *Brown's Adm'r v. Mattingly*, 91 Ky., 275; and we would be gratified could it always be enforced in settlement and distribution of every decedent's estate, though we recognize the fact that the courts in Kentucky sometimes find themselves embarrassed by the provisions of the Kentucky Statutes, sec. 2087, being but a re-enactment of former statutes, wherein it is provided "that when the heir or devisee shall *alien, before suit brought*, the estate descended or devised, he shall be liable for the value thereof, with legal interest, from the time of alienation, to the creditors of the decedent or testator; but the estate so aliened shall not be liable to the creditors in the hands of a *bona fide* purchaser for a valuable consideration, unless suit is instituted within six months after the estate is devised or descended to subject the same."

The objections to allowing anything to pass in this case by the assignment of Roger W. Jones to his assignee, as against an equity in his father's estate, under this statute are, first, that suit was already filed and was pending for the settlement of his father's estate, involving the subjection of his one-sixth interest in said estate to the relief of the other heirs of said estate. And, secondly, neither an assignee nor the creditors under a deed of assignment are *bona fide* purchasers for a valuable consideration. They have at most an equity, and in this case manifestly inferior to the equity

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of the other heirs and devisees of Roger Jones, deceased. Wherefore it is adjudged that so much of the judgment of the Clark Circuit Court rendered on the 16th day of March, 1893, as declared that after the payment of the debts filed and adjudged against the estate of Roger Jones, including this bank debt for his son, then there shall be set apart to the assignee of Roger W. Jones for the payment of his debts, under his deed of assignment, one-sixth of the remainder of said estate, is hereby reversed and set aside.

And this cause is remanded to said court for further proceedings consistent with this opinion.

CASE 35—PETITIONS ORDINARY—APRIL 9.—

Louisville & Nashville Railroad Co. v.
Commonwealth.

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APPEALS FROM HOPKINS AND M'LEAN CIRCUIT COURTS.

1. **RAILROADS—DUTY TO PROVIDE WATER-CLOSETS AT STATIONS—REPEAL OF STATUTE.**—Sec. 191 of the original act of April 5, 1893, in relation to private corporations, in so far as it required all railroads doing business in this State to provide convenient and suitable waiting-rooms and water-closets at all depots in cities and towns and to keep same in decent order and repair, is still in full force and effect, and was not changed or modified by the amendment of July 1, 1893, to that section. The addition of the words "or privies" in the amendatory act does not change the meaning, the word "privy" as here used having substantially the same meaning as the word "water-closet."
2. **SAME.**—Under this statute railroad companies may exercise a reasonable discretion as to the kind of structure to be used and the internal arrangement thereof, provided it is kept decent and in a cleanly condition.
3. **SAME.**—Railroad companies may be required to comply with this statute in so far as it applies to depots in towns and cities without being first ordered to do so by the Railroad Commissioners.

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WILBUR F. BROWDER FOR APPELLANT.

1. It was the intention of the Legislature to require railroad companies, when so directed by the Railroad Commission, to maintain *either* a water-closet or a privy at stations on its line. The compilers of the Kentucky Statutes have omitted from sec. 772 the words "or privies" used in the amendatory act of July 1, 1893. (Acts 1891-2-3, p. 1262.)
2. A notice from the Railroad Commission to the railroad company that no water-closet or privy has been provided is a condition precedent to a prosecution under this statute.

GORDON & GORDON AND H. W. BRUCE OF COUNSEL ON SAME SIDE.

WM. J. HENDRICK, ATTORNEY-GENERAL, FOR APPELLEE.

The only point insisted upon by the Commonwealth is that the construction given the statute in the opinion to be rendered herein shall be clear and conclusive so as to enable the officers of the Commonwealth to enforce obedience of its provisions by the railroad companies.

JUDGE GRACE DELIVERED THE OPINION OF THE COURT.

These two appeals, one from Hopkins and the other from McLean county, involve the same questions and by agreement are heard together, and in the same brief of counsel.

The first question submitted by appellant is whether the original act of April 5, 1893, in relation to private corporations, and sec. 191 of same, which required all railroads doing business in this State to provide convenient and suitable waiting-room and *water-closet* at all depots in cities and towns, and to keep same in decent order and repair, is still in full force and effect, or whether it has been materially changed or modified by an amendment to said section, adopted by the legislature and approved July 1, 1893. A careful examination of both sections satisfies us that no change or modification has been made, or was intended to be made. The words used, or rather the additional word

"privy," used in the amendatory act, has substantially the same meaning as water-closet in the first act, all looking to the comfort and convenience of those traveling upon, or waiting to enter, or leaving the respective trains run by the several railroads of the State; and without attempting to embellish this opinion by minute description or accurate literary or scientific distinctions of the particular structure to be used or the internal arrangement thereof, we think it sufficient to say that, while same is kept decent, and in a cleanly condition, as required by legislative enactment, the railroads may exercise a reasonable discretion as to the details, without apprehension of any prosecution by the Commonwealth on account of the particular one adopted.

Another question suggested by counsel for appellant is whether the railroad company can be required to comply in any manner with the statute, unless first ordered to do so by the railroad commissioners of the State. On this question we also find that notice for this purpose is unnecessary for depots in towns or cities, while it may be necessary for other stations.

The notice mentioned in sec. 191 is specially applicable to cases where a depot has been burned, or when same in the opinion of the railroad commissioners "becomes unfit for the accommodation of the public;" that then the commissioners shall notify the railroad company to rebuild or repair the same as in their opinion the necessity of the case may require. Neither of these things was changed or modified by the amendment of July, 1893. We do not think the legislature contemplated any change in either. The change attempted to be made in these sections (and of which we doubt whether the legislature itself had any knowledge), pertains to a matter of far more importance and one of substance, and that is, that by the one hundred and ninety-first

section of the original act the railroad company was not only prohibited from "abandoning any depot that it had maintained for five years" on its line of railway, but was also *enjoined*, "that it should not substantially diminish the accommodations furnished by the stopping of trains thereat, as compared with that furnished at other substantially similar stations on the same road," without the written consent of the railroad commission. This provision is omitted in the amendatory act of July 1, 1893. And this is the only and substantial change attempted to be made in the two acts, and this amendment being embraced together with quite a number of others in the same chapter, and referring only to the original acts by sections. And without copying same, or giving any other reference to same, or denoting in any way the change sought to be made, other than by a reference to the sections, as by saying "that sec. 191 be so amended as to read as follows," then comes the new act with the omission as pointed out. So that we do not wonder that the amendment has escaped the observation of the accurate and careful compilers of our statutes. As this question is not, however, up now for adjudication, we forbear further comment on same. The views of the court in each county below correspond to the opinion of the court as herein expressed.

The judgment in each case is affirmed.

Moreland's Assignee v. Citizens' Savings Bank.

CASE 36—PETITION ORDINARY—APRIL 10.

| 97 211
117 604**Moreland's Assignee v. Citizens' Savings
Bank.**

APPEAL FROM DAVEISS CIRCUIT COURT.

- 1. NEGOTIABLE INSTRUMENTS—ACCOMMODATION PAPER—MISAPPLICATION OF PROCEEDS.**—If a note be made for general accommodation without restriction as to its use, the party accommodated has the right to sell it and receive the proceeds, and the fact that he fails to appropriate the proceeds according to a prior agreement constitutes no defense for the accommodation maker.

Where the cashier of a bank who acted for the bank in discounting an accommodation note induced the payee to apply the proceeds to the payment of certain insurance premiums in which he, the cashier, as agent of an insurance company, had an interest, which he knew to be a different purpose from that contemplated by the accommodation maker, these facts constitute no defense to the note in the hands of the bank, as the cashier's agency for the bank ceased when the bill was purchased, and the bank is not bound by his acts with reference to the proceeds.

- 2. NOTICE OF PROTEST.**—As the petition alleges that Owensboro, Ky., was the postoffice address of the maker, that he did not reside in Owensboro, Ky., when the bill was protested, and that the notice of protest was by the notary addressed and mailed to him at Owensboro, Ky., and that he received it, and these allegations are not denied, there can be no doubt as to the sufficiency of the notice.
- 3. AUTHORITY OF NOTARY PUBLIC.**—The fact that a notary is the cashier of and a stockholder in a bank does not prevent him from protesting a bill held by the bank.

C. S. WALKER FOR APPELLANTS.

- 1.** The answer presents a good defense. A diversion of accommodation paper from the special purpose for which it was executed will release the accommodation drawer, and one who takes the paper with knowledge of the diversion is not a *bona fide* holder. (1 Daniel on Negotiable Instruments (3d ed.), secs. 177, 789, 776a, 770, 790, 791, 792; Thompson v. Poston, 1 Duv., 392; 2 Am. &

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Eng. Enc. of Law, p. 395, note; *Idem*, p. 394; Russell v. Ballard, 16 B. M., 205; Brandt on Suretyship and Guaranty, vol. 2 (2d ed.), sec. 397; *Idem*, vol. 1, sec. 115; *Idem*, vol. 2, p. 578, note 2.)

2. The notary public who pretends to have protested the bill for non-payment, and to have given notice thereof to the drawer, was at the time the cashier of and a stockholder in the appellee bank and hence such protest and notice were invalid and nugatory. (Acts 1883-4, vol. 2, sec. 4, p. 1191; Todd v. Edwards & Co., 7 Bush, 93, 94; Gen. Stats., ch. 79, sec. 5; Mulholland & Bro.'s v. Samuels, 8 Bush, 65; Glauque's Notary's and Conveyancer's Manual, 2; 16 Am. & Eng. Enc. of Law, pp. 774, 775 and notes.)

ROBERT S. TODD AND REUBEN A. MILLER FOR APPELLEE.

1. The knowledge of Moore as agent of the insurance company was not the knowledge of the bank and notice to him was not notice to the bank. (Waynesville Natl. Bank v. Irons, 8 Fed. Rep., 1, 9; First Natl. Bank v. Christopher, 40 N. J. Law, 435; Barnes v. Trenton Gas Light Co. 27 N. J. Eq., 33; Lyne v. Bank of Ky., 5 J. J., Mar., 545; First Natl. Bank v. Loyhed, 28 Minn., 396; West Boston Savings Bank v. Thompson, 124 Mass., 506; First Natl. Bank v. Gifford, 47 Iowa, 575.)
2. As the notary himself, although the cashier of and a stockholder in the bank, would be a competent witness under our law to testify concerning the protest and the notice of dishonor, his certificate is likewise competent under our statute to prove these facts.

The cases of Herkimer Co. Bank v. Cox, 21 Wend., 119, and Bank v. Porter, 2 Watts, 141 (cited in 16 Am. & Eng. Enc. of Law, p. 775), distinguished.

JUDGE PAYNTER DELIVERED THE OPINION OF THE COURT.

This action is upon a bill of exchange for \$2,900, dated March 24, 1892, drawn by J. P. Moreland, accepted by T. V. Valden, and endorsed by J. A. Fuqua, made payable at appellee Citizens Savings Bank six months after date.

J. P. Moreland having made an assignment, the appellant Taylor, his assignee, resisted a recovery on the bill of exchange claiming (1) that it was drawn for accommodation and the proceeds were fraudulently diverted; (2)

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that the notary public was the cashier of and a stockholder in the appellee bank, therefore he had no legal right to protest or give notice thereof. It is claimed that no notice of protest was given as required by law.

The appellant filed an answer and an amended answer, to which the court sustained a demurrer. Failing to plead further, judgment was rendered against appellant for the amount of the bill of exchange and interest. From that action of the court this appeal is prosecuted.

In considering the question the material allegations of appellant's pleadings will be taken as true. It is alleged in the original answer that W. H. Moore was cashier of, and a stockholder in, the appellee bank when the bill was made, as well as being the agent of life insurance companies and sharing largely in the premiums paid such companies; that Walden was a borrower of money from appellee; that he was under the influence and domination of Moore; that Moore procured him to discount paper with the proceeds of which he purchased \$105,000 life insurance; that Moore got one-fourth of the premiums paid; that Walden was insolvent; that the bill in suit was discounted to enable Walden to pay premiums on life policies, Moore getting one-fourth thereof; that no money was advanced to Walden on the bill, but Moore appropriated it to pay the premiums.

It is further alleged that Moreland "signed the bill in suit believing the said Walden would use it in renewal of bills he, the said Moreland, was already bound for; or *that the money would be paid to said Walden.*"

It appears that Moore occupied a dual position in the transaction. In the purchase of the bill of exchange he represented the appellee; in inducing Walden to procure policies in life insurance companies he represented such companies.

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It is not alleged that the appellee obtained any benefit from the discount of the bill of exchange other than that which would ordinarily flow from such a transaction, or that the money which it paid for did not go where Walden desired it, or that the bank retained a cent of the proceeds of it, or had any interest in an improper diversion of the proceeds.

The allegation is that Moreland signed the bill believing that it would be used in renewal of bills for which he was already bound, or "*that the money would be paid to said Walden.*" From this allegation we must conclude that Walden had the authority from the drawee to sell the bill and get the money for which it would sell. This placed no restriction or limitation upon Walden's right to dispose of the bill when and where he pleased, or to receive its proceeds. It follows that Walden had the right to sell the bill to the appellee, and receive its proceeds.

It may be said that the facts alleged in the amended answer as to the purpose for which the bill was drawn restrict the right of Walden in the disposition of the bill.

In the amended answer it is alleged "that at the time and for many years previous to the making of the paper in suit, his co-defendant, Walden, was engaged in business, necessitating the borrowing of money for use therein, and did borrow largely from plaintiff and other banks for this purpose, defendant Moreland indorsing his mercantile paper.

"He says that the paper in suit was made for this and no other purpose, and by agreement between said Moreland and said Walden that it was to be discounted and used thus and not otherwise.

The office of an amended pleading is not to contradict or to make statements inconsistent with those contained

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in the pleadings sought to be amended. The facts alleged are not inconsistent with the idea that Walden had the right to sell the bill and receive the proceeds.

The allegations of the amended answer as to the business in which Walden was engaged, which necessitated the borrowing large sums of money, and the purpose for which the bill in suit was made, are vague and indefinite.

It is true that it is alleged that Moreland indorsed Walden's mercantile paper, but in stating the purpose for which the bill was made it is impossible to tell from the language used the character of business in which the proceeds were to be used.

As pleadings should be strongly construed against the pleader we conclude that Walden had the right to sell the bill and accommodate himself in the disposition of the proceeds.

Moore represented the bank in buying the bill of exchange, but when he, as the agent of insurance companies, obtained Walden's consent to, or did for Walden, apply the proceeds of the bill in paying premiums on policies of life insurance, then he was not acting for the appellee and it should not be held to be bound by his acts. He was not employed by the appellee to solicit for life insurance companies or to transact business for such companies. The appellee did not participate in his profits in the life insurance business, nor was it in any way associated with him in such transactions. His agency for the bank ceased when the bill of exchange was purchased. There was no restriction as to the use of the bill, as Walden had the right to sell it and receive the proceeds.

"If the note be made for general accommodation without restriction as to its use, the party accommodated may use it in any way beneficial to himself, provided such use be

legal, and it will not matter that he fails to apply the proceeds according to a prior agreement, for otherwise there could be no recovery on accommodation paper." (Daniel on Negotiable Instruments, sec. 793.) This doctrine is announced in *Brooks v. Hey*, 23 Hun., 374, wherein the court said "the failure on the part of a payee of an accommodation note to appropriate the proceeds according to a prior agreement, is no defense for the accommodation maker, otherwise there could be no recovery on an accommodation note. When there is no restriction as to the use which the payee shall make of the note, it is sufficient if he receives a full and legal consideration for it when he transfers it."

In *Dunn v. Weston*, 71 Me., 270, the same principle is approved.

Black, C. J., in *Lord v. The Ocean Bank*, 20 Pa. St., 384, says: "But the maker of an accommodation note can not set up the want of consideration as a defense against it in the hands of a third person, though it be there as collateral surety merely. He who chooses to put himself in the front of a negotiable instrument for the benefit of his friend must abide the consequences (*Walker v. Bank*, 12 Serg. & R., 382), and has no more right to complain if his friend accommodates himself by pledging it for an old debt than if he had used it in any other way. This was decided (*Appleton v. Donaldson*, 3 Pa. St., 381), in a case strongly resembling the present one. *Accommodation paper is a loan of the maker's credit without restriction as to the manner of its use.*"

Whenever a bill of exchange is made for accommodation, and the purpose was to raise money by its sale, the one who buys and pays for it can not be held to look to the application of its proceeds. In such case there can not be

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said to be a diversion of the bill though the proceeds may not have been used as the accommodated party agreed with the maker that it should be.

The remaining questions to be considered are as to the authority of the notary to protest the bill, and as to the sufficiency of the notice of protest.

As to the latter there can be no doubt. It is alleged in the petition that Owensboro, Ky., was and is the postoffice address of Moreland; that he did not reside in Owensboro, Ky., when the bill was protested; that the notice of protest was addressed and mailed to him at Owensboro, Ky., and that he received it.

These allegations of the petition are not denied.

It is insisted that the notary being cashier of, and a stockholder in, the bank could not legally protest the bill. To sustain this contention the cases of *Herkimer Co. Bank v. Cox*, 21 Wend., 119, and *Bank v. Porter*, 2 Watts (Pa.) 141 are cited. In these cases the court proceeded upon the idea that as the notary was incompetent as a witness by reason of his interest, under the law of New York and Pennsylvania, therefore his certificate should not be competent to prove demand and notice. If the reasoning of the court in these cases was then good it would not now be in this case because the fact that the notary had an interest in the bank does not render him incompetent as a witness against the parties to the bill in suit. Our statute declares him to be a competent witness.

Judgment affirmed.

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CASE 37—PETITION ORDINARY—APRIL 10.

Arthurs v. Thompson.

APPEAL FROM GREENUP CIRCUIT COURT.

1. COUNTER-CLAIM AND SET-OFF.—The fact that the defendant's pleading is improperly styled an "answer and counter-claim," instead of an "answer and set-off," does not deprive him of the right to such relief as he may show himself entitled to. And it was error in this case to strike out, on plaintiff's motion, so much of defendant's pleading as asserted a "counter-claim," although the items of indebtedness thus pleaded properly constituted a set-off and not a counter-claim.
2. COUNTER-CLAIM.—Claims which neither arise out of the transactions set forth in the petition nor have any connection with the subject of the action can not be pleaded as a counter-claim.
3. SET-OFF.—Although the claims asserted by defendant do not arise out of any express contract, yet as the facts alleged raise an implied promise to pay, the claims are properly pleadable as a set-off.
4. APPELLATE JURISDICTION.—While the amount for which judgment was rendered against appellant was insufficient to give this court jurisdiction, yet, as the items pleaded by him as a counter-claim exceeded the sum of one hundred dollars, this court has jurisdiction of the appeal.

B. F. BENNETT FOR APPELLANT.

1. The court erred in striking from appellant's answer the matters pleaded as a counter-claim. (Civil Code, sec. 96; *Idem*, sec. 113, sub-sec. 2; 7 Wait's Actions and Defenses, pp. 530-534; Murphy v. Hubble, 2 Duv., 247-253; Tinsley v. Tinsley, 15 B. M., 454-461; Rooney v. Tierney, 82 Ky., 255.)
2. It was also error to strike from the record the amended answer and set-off. If the claim asserted did not possess the elements of a counter-claim, it certainly did possess the elements of a set-off. (Civil Code, sec. 96, sub-sec. 2; 7 Wait's Actions and Defenses, 532; Duncan v. Duncan, 2 Bibb, 584; Eversole v. Moore, 5 Bush, 49; Haddox v. Wilson, 3 Bush, 523; Hayes v. Goodwin, 4 Met., 80; Roebuck v. Tennis, 5 Mon., 83; Jenkins v. Richardson, 6 J. J. Mar., 441; Littell v. Shockley, 4 J. J. M., 246; Wake v. Bank of Commonwealth, 2 Dana, 394.)

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BEN E. ROE FOR APPELLEE.

The matters pleaded by defendant did not constitute either a counter-claim or a set-off and were, therefore, properly stricken out. (Civil Code, sec. 96.)

JUDGE EASTIN DELIVERED THE OPINION OF THE COURT.

This action was brought by appellee on an open account for goods sold and delivered, and for money loaned to appellant. The latter filed a pleading in the court below, which was styled and denominated by the pleader as an "Answer and Counter-claim," in which he relied, in defense of the cause of the action set up in the petition, upon two or more alleged items of indebtedness which he claimed were due to him from appellee, and for which he asked judgment over against appellee.

A motion by counsel for appellee to strike out from that pleading certain designated parts, which embrace so much thereof as constitutes the so-called "counter-claim," was sustained by the court below, to which appellant excepted. At the same term of the court an amended pleading was filed by appellant styled "Amended Answer and Set-off," in which he pleaded in defense of the action and relied, by way of set-off, upon one of the same items of alleged indebtedness from appellee to him which he had undertaken to plead as a counter-claim in his original pleading, and which was about equal in amount to the sum sued for by appellee. A motion to strike this amended pleading from the record was sustained, to which appellant excepted, and, upon his declining to plead further, a judgment was rendered against him for the admitted amount of appellee's claim as set up in the petition, and, from the orders and judgment referred to, this appeal is prosecuted.

The only material question to be considered arises out

Arthurs v. Thompson.

of these orders of the court below striking out so much of the original pleading filed by appellant as attempted to set up a counter-claim, and striking from the record the amendment which attempted to plead a set-off.

While neither of these pleadings is artistically or very accurately drawn for the purpose for which it was intended, and while it is clear that the items of defense set up in the original pleading do not technically constitute proper subjects of "counter-claim" in the action, for the reason that they neither arise out of the transactions set forth in the petition nor have any connection with the subject of the action, yet they might, in our opinion, be properly pleaded as a set-off against the demand set up in the petition.

It is true also that they do not arise out of any express contract, but, if the facts alleged by appellant, as to the overpayment, through ignorance and mistake, by the check given to appellee, and as to the payment made to him, as surety, on an obligation to appellee which was paid off and fully discharged by the principal debtor, be true, then we think the law would raise a promise on part of appellee to repay these sums, and create at least an implied contract to do so. This, in our opinion, would be sufficient to make them available, under the provisions of the Code, as a set-off.

Is the fact, then, that they were attempted to be pleaded as a counter-claim, instead of a set-off, sufficient to justify the action of the lower court, in striking out of appellant's original pleading everything pertaining to these items? We certainly think not. By sub-sec. 4, sec. 97, of the Civil Code, it is provided, that, "a defendant shall not have judgment upon a set-off or counterclaim, unless the caption of the answer contain the words, answer and set-off, or the words, answer and counterclaim; but a misdescription in the cap-

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tion of the nature of the defendant's claim shall not prevent him from having judgment," etc.

This court in the case of *Cason v. Cason*, 79 Ky. 558, in construing this section, has said that "the object of this provision is to apprise the adverse party that a claim is set up either in the nature of a set-off, or counter-claim, upon which a judgment is sought, and to prevent him from being misled by denominating the pleading an answer only."

In that case the pleading was simply styled, "Answer of defendant," but contained the allegations necessary to make a counter-claim, and it was held that the plaintiff, by joining issue upon the counter-claim, waived all objection to the defective style and caption of the pleading.

The purpose of the rule being, as we thus see, to convey to the plaintiff the information that the defendant is demanding relief over against him, by way of set-off or counter-claim, and the plaintiff, having himself furnished indisputable evidence of the fact that he has that information, by pleading to the counter-claim, may well be held to have waived all objection, because of a failure to comply with the rule.

While the plaintiff in this case has not, by pleading over, furnished this evidence of his knowledge as to the nature and scope of the wrongly-styled pleading, yet, by his motion to strike out, he has shown in an equally clear and convincing manner that he fully comprehended the purposes of this objectionable pleading.

But, aside from all this, the pleading in the case now before us was styled, as we have before stated, "*Answer and Counter-claim*," and therefore, did furnish, on its face, the very information which it is the purpose of the rule to provide, viz.: that the defendant is asking some relief over against the plaintiff, and this mere inaccuracy, in using

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the word "counter-claim" instead of "set-off," in the caption of this pleading, does not, either upon principle, or under the express provision of the Code, deprive the pleader of the right to such relief as he may show himself entitled to. By the very language of the Code above quoted "a misdescription, in the caption, of the nature of the defendant's claim shall not prevent him from having judgment," and we are of the opinion that the court below erred in striking out the matter pleaded as a counter-claim by appellant in his original answer and in striking from the files his amended answer and set-off. While the amount for which judgment was rendered against appellant was insufficient to give this court jurisdiction, yet the items pleaded by him as a counter-claim exceeded the sum of one hundred dollars and were sufficient to give jurisdiction of this appeal.

Wherefore the judgment of the lower court is reversed, and the cause is remanded for further proceedings consistent with this opinion.

CASE 38—FORCIBLE DETAINER—APRIL 11.

Louisville & Nashville Railroad Co. v.
Bickel.

APPEAL FROM JEFFERSON CIRCUIT COURT, LAW AND EQUITY
DIVISION

NEW TRIAL—SURPRISE.—Where the right to recover in a forcible detainer proceeding was based upon the ground that one of the defendants, to whom plaintiff had leased the premises, had, without authority, sub-let them to his co-defendant, and it was not claimed upon the trial in the justice's court that plaintiff corporation or any of its officers had consented to the sub-let-

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ting, the fact that upon the trial of the traverse in the circuit court the original lessee testified that plaintiff's president was notified by him of his purpose to sub-let the premises and assented thereto, was such a surprise as entitled plaintiff to a new trial upon that ground, plaintiff having upon the introduction of the unexpected testimony moved for a continuance upon the ground that it was taken by surprise and that its president was then absent from the State.

HELM & BRUCE FOR APPELLANT.

Appellant was entitled to a new trial upon the ground of surprise. (McFarland v. Clark, 9 Dana, 136; McCall v. Hitchcock, 9 Bush, 71; McKinney v. Commonwealth, 1 J. J. Mar., 319; Mahan v. Jane, 2 Bibb, 33.)

O'NEAL, PHELPS, PRYOR & SELIGMAN FOR APPELLEES.

1. If a forfeiture is incurred from underletting, and the landlord accepts rent falling due after such sub-letting, with a knowledge of such fact, it is a waiver of the forfeiture. (Taylor's Landlord and Tenant, sec. 479; Whitchot v. Fox, Cro. Jac., 398; 12 Am. & Eng. Enc. of Law, 758; Ireland v. Nichols, 2 Sweeney (N. Y.), 289; Roe v. Harrison, 2 T. R., 425.)
2. There was not such "surprise" as entitled appellant to a new trial.

JUDGE PAYNTER DELIVERED THE OPINION OF THE COURT.

The appellee, Jacob Bickel, leased of the Louisville, Cincinnati & Lexington Railway Company for a period of twenty years a parcel of ground in Louisville. The appellant, Louisville & Nashville Railroad Company, acquired the property so leased, and succeeded to the rights in the lease, which were held by the Louisville, Cincinnati & Lexington Railway Company.

Without the consent, in writing, of the appellant, Bickel sub-let, for a period of several years, a part of the leased ground to the appellee, Lawrence Pezold. By the terms of the lease it is provided, in substance, that the lease shall not be assigned or transferred, in whole or in part, by

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voluntary act or operation of law, nor shall the premises or any part of it be sub-let except by the consent of the lessor in writing.

It was further provided for a violation of the provisions named, should such violation continue for a space of thirty days, the lessor could terminate the lease after five days' notice in writing.

The appellant gave the appellees notice as required by the lease, of its purpose to claim the forfeiture and regain possession of the leased premises, and appellees failing to surrender the premises, a writ of forcible detainer was sued out before a justice of the peace, and at the trial of which the jury found appellees guilty of forcible detainer. They traversed the finding, and on the trial of the writ, in the court below, they were found not to be guilty of the forcible detainer.

On the motion and ground for a new trial several reasons were assigned why a new trial should be granted.

We will consider but one of the grounds filed, to-wit: Accident or surprise, which ordinary prudence could not have guarded against. It appears that at the trial the appellee, Jacob Bickel, testified, in substance, that M. H. Smith was the president of the Louisville & Nashville Railway Company. That about the time the lease was given to Pezold, Smith was made acquainted with appellee Bickel's purpose to sub-let part of the leased premises, and that he (Smith) consented thereto; that Smith was in the habit of passing the premises in going to his country home; that the business sign of the appellee, Pezold, was on the blacksmith shop. After this testimony was given, counsel for appellant filed his affidavit stating that it was a complete surprise to him, and that M. H. Smith was then in New York and would not return until the following week, and moved the court to

continue the case on the ground of surprise. The court overruled the motion and proceeded with the trial.

On the motion for a new trial the appellant filed the affidavit of Helm Bruce, who, as counsel for appellant, conducted the trial before the justice of the peace, and from whose affidavit it appears that the appellees were both present at that trial; that neither of them testified at that trial to any conversations with Smith, nor any other officer of the appellant, concerning the sub-lease to Pezold, nor as to any knowledge of Smith or any other officer of the appellant of the sub-lease.

He further states that the only points in behalf of appellees on the subject of the knowledge or notice of such sub-letting was the legal proposition that the recording of the lease to Pezold was legal notice to appellant.

The affidavit of M. H. Smith was filed, in which he says the testimony of Bickel is absolutely and entirely untrue; that he never, and so far as he knows no officer of the company, had any notice of the sub-lease, until shortly before the giving of the notice demanding the possession of the premises. He says he never suspected that Bickel would give such testimony, hence never supposed he would be needed as a witness, and was absent from Louisville when the trial took place.

The court gave the jury only one instruction, which reads as follows:

"The court instructs the jury that if they believe from the evidence that the plaintiff company or its chief officer knew of the sub-letting to Lawrence Pezold of the premises in dispute, and did not object thereto, and thereafter accepted rent from said Jacob Bickel, then the law is for the defendant, and the jury should so find."

It was proper for the court to give this instruction to the
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jury, because if the appellant knew of the sub-letting, and afterward accepted the rent due under the lease, it certainly waived any right it had to claim a forfeiture on account of such sub-letting.

The whole case was made to turn, not upon the question as to a consent, in writing, to sub-let, but upon the knowledge and assent of appellant to such sub-letting and the receiving of rents thereafter. The mere statement of the facts illustrates the importance of the testimony of its president, M. H. Smith, the officer whom Bickel testified knew of the sub-letting, and expressed his gratification thereat.

No rule can be laid down by which can be determined the character of the accidents and surprises that will justify the courts in granting new trials.

The facts of each case must determine the matter. It seems to us that counsel for appellant, nor its president, M. H. Smith, could be required in this case to anticipate the testimony which was given by appellee Bickel.

It appears that he did not testify in the justice's court that Smith had any knowledge of the sub-letting, but, upon the contrary, it was sought to charge appellant with notice of such sub-letting by the recorded lease of Bickel to Pezold. This contention was calculated to lead counsel for appellant to believe that the appellees would continue to seek to impute knowledge of the sub-letting in the same way; besides there was a provision in the lease requiring that a consent to such sub-letting must be in writing. The president of the company denying that he had the conversation as testified to by Bickel, it is fair to conclude that he had the right to rely upon the fact that no such writing had been executed, as conclusive of the question involved, especially in view of the fact that no pretense of assent to the sub-letting had been made on the trial in the justice's court.

In *McFarland v. Clark*, 9 Dana, 136, a writing had been shown a witness some time before the trial, which purported to be a receipt, and she did not deny, but virtually admitted, its genuineness.

At the trial she denied that she had signed the paper, and denied that she had ever heard of it. On the motion for a new trial one of the plaintiffs filed his affidavit stating that the paper had been shown the witness and she did not deny its execution as stated; that he could prove the facts by others, naming them, but as he did not suspect that the witness would testify as she did he therefore was surprised.

This court held that a new trial should have been granted for that reason. The court in stating the difference between a ground for a new trial merely because of the discovery of testimony to impeach a witness who testified on the trial, and surprise, said: "Surprise is altogether a different ground for a new trial. It does not, like discovery, imply negligence, but shows a satisfactory reason for the non-production of the testimony known to exist, but the materiality of which, as the trial resulted entirely from the unexpected fact respecting which the party seeking a new trial had been lulled, either by the antagonistic party or the witness of that party, and, therefore, been surprised. And in the case of such surprise the fact that the omitted testimony may tend to impeach a witness who had been examined on the first trial is not material."

In *McCall v. Hitchcock*, 9 Bush, 71, this court quotes, with approval, what is denominated a general principle of practice, to-wit: "When a party or his counsel are taken by surprise, whether by fraud or accident, on a material point or circumstance, which could not reasonably have been anticipated, and where want of skill, care or attention

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can not be justly imputed, and injustice has been done, a new trial will be granted."

We are of the opinion that the surprise was such that ordinary prudence could not have guarded against it.

Wherefore the judgment is reversed with direction that a new trial be granted appellant and further proceedings be had consistent with opinion.

CASE 39—PETITION ORDINARY—APRIL 11.

Brown's Admr. v. Louisville & Nashville Railroad Co.

APPEAL FROM JEFFERSON CIRCUIT COURT, COMMON PLEAS DIVISION.

1. APPOINTMENT OF ADMINISTRATOR.—The statute giving a right of action against a railroad company to the administrator of one who has been killed by the negligence of the company implies the right to have an administrator appointed in this State for the sole purpose of prosecuting such action, although the decedent was a resident of another State and had no personal estate in Kentucky and had no debts due him here.
2. SAME—RES JUDICATA.—As the question as to whether plaintiff was a lawfully appointed administrator was made by defendant on affidavits and by preliminary motion in the court below, and was decided in favor of plaintiff, it was no longer an open issue proper to be made again in the same case between the same parties, and plaintiff was right in not accepting such issue and in introducing no evidence on same on the final trial.
3. ACQUIESCENCE IN USE OF RAILROAD TRACK.—Simple acquiescence on the part of a railroad company in the use of its track by the public as a passway does not confer authority or right nor amount to license to so use it.
4. A TRESPASSER ON A RAILROAD TRACK who is struck and injured by a passing train can not complain that the train was too heavy, or the machinery insufficient, or that the train was imperfectly manned, as the company owes him no duty as to any

97	228
e112	434
e112	435
97	228
e117	776

97	228
d120	249

97	228
e121	488
122	308
f122	394
p122	397
123	792
e123	793

97	228
125	58
125	341

97	228
128	414

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of these things. The only duty which the company owes to a trespasser on the track is to use reasonable care to avoid injuring him after discovering his peril, and to keep a lookout in cities where persons are likely to be found trespassing on its right of way.

PHELPS & THUM FOR APPELLANT.

1. The court erred in giving a peremptory instruction for defendant. Even if there be no dispute about the facts, yet if honest and sensible men might reasonably draw different inferences about the conclusion, the court will never take the case from the jury. (*Railroad Co. v. Stout*, 17 Wall., 657; *Murphy v. Canal Co.*, 9 Bush, 533.)

While it may be true that in general the engineer may assume that a person in front of the train on the track will step out of the way of a train, yet it is his duty to give warning, and the evidence here is that he gave no warning until he was too close to the man to stop the train or to take any step whatever, in case it might be observed that the warning was ineffectual. It is also the law that even in respect to trespassers the engineer must keep a lookout, if the point where the party was injured was in a city, or where trespassers are likely to be found. (*East Tennessee Coal Co. v. Harshaw*, 16 Ky. Law Rep., 526; *McDermott v. Ky. Cent. R. Co.*, 93 Ky. 112; *Hammill v. L. & N. R. Co.*, 93 Ky., 346; *L. & N. R. Co. v. Popp*, 16 Ky. Law Rep., 372; a. c., 96 Ky., 99.)

2. The Jefferson County Court had authority to appoint an administrator. The right of action which existed under the statute constituted an asset, which authorized the appointment.
3. The court heard proof by affidavits which show the appointment of the Trust Co. as administrator; and while the order book was the best evidence, yet as the affidavits were read without objection, the court had the right to decide the jurisdictional question upon them.

A. E. WILLSON AND JACOB MERRIWETHER OF COUNSEL ON SAME SIDE.

LYTTLETON COOKE FOR APPELLEE.

1. The County Court of Jefferson county, Ky., had no right to appoint the Louisville Trust Company administrator of Thomas Brown. (*Fletcher's Adm'r v. Sanders, &c.*, 7 Dana, 347; *McChord*

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- v. Fisher's Heirs, 13 B. Monroe, 193; Thum v. Gresham, 2 Met., 306; Hyatt v. James' Adm'r, 8 Bush, 10; Jeffersonville Railroad Co. v. Swayne's Adm'r, 26 Ind., 47; Perry, Adm'r, v. St. J. & West. R. Co., 29 Kan., 420; and 11 Am. & Eng. R. Cases, 663.)
2. Passive acquiescence does not amount to a license. (Finlayson v. Chicago, &c., R. Co., 1 Dillon, U. S. Ct., 579; Bancroft v. Boston, &c., R. Co., 97 Mass., 276; Gaynor v. Old Colony R. Co., 100 Mass., 508; Jeffersonville, &c., R. Co. v. Goldsmith, 47 Ind., 43; Indiana, &c., R. Co. v. Hudelson, 13 Ind., 525; Galena, &c., R. Co. v. Jacobs, 20 Ill., 478; Illinois, &c., R. Co. v. Hetherington, 83 Ill., 510; McLaren v. Indianapolis, &c., R. Co., 8 Am. & Eng. R. Cases, 217 Yarnall v. St. L., K., C. & M. R. Co., 10 Am. & Eng. R. Cases, 726; Hogan v. Chicago, &c., R. Co., 15 Am. & Eng. R. Cases, 439; Central R. Co. of Ga. v. Brinson, 10 Ga., 207, and 19 Am. & Eng. R. Cases, 42; Glass v. Memphis & Charleston R. Co., 10 Southern Reporter, 215.)
3. Railroad companies are entitled to the exclusive use of their tracks, except at public crossings, etc., and owe no duty to trespassers upon their tracks or premises, until those operating their trains see and know the peril in which trespassers have placed themselves. (L. & N. R. Co. v. Lyter, 6 Ky. Law Rep., 223; L. & N. R. Co. v. Howard's Adm'r, 6 Ky. Law Rep., 163; Nichols' Adm'r v. L. & N. R. Co., 9 Ky. Law Rep., 702; Shackelford's Adm'r v. L. & N. R. Co., 84 Ky., 43; K. C. R. Co. v. Gastineau's Adm'r, 83 Ky., 121; John's Adm'r v. L. & N. R. Co., 10 Ky. Law Rep., 758; L. & N. R. Co. v. Cooper's Adm'r, 7 Ky. Law Rep., 102; Johnson's Adm'r v. L. & N. R. Co., 91 Ky., 651; Gresham v. L. & N. R. Co., 15 Ky. Law Rep., 599; Oatts v. C., N. O. & T., P. R. Co., 15 Ky. Law Rep., 87; McDermott v. K. C. R. Co., 14 Ky. Law Rep., 437 and C. &c., R. Co. v. Yost, decided February 5, 1895; Akers v. Chicago, St. Paul, &c., R. Co. 60 Am. & Eng. R. Cases, 30; Paducah & Memphis R. Co. v. Hoehl, 12 Bush, 41.)

JUDGE GRACE DELIVERED THE OPINION OF THE COURT.

The first question presented by this appeal is whether an administrator appointed in Kentucky on the estate of a decedent who was a non-resident of the State at the time of his decease, and who had no personal estate in Kentucky at the time of the appointment of the administrator here, other than a claim, demand or right of action given by the Kentucky statute to the administrator of a decedent who has.

been killed by the gross negligence of a railroad company in Kentucky, is a lawfully-appointed administrator. This question was made by defendant on affidavits, and by preliminary motion in this case in the court below, and decided on hearing in favor of such right as a lawful appointment, and as conferring the right to sue for such damages given under our statute. The question being thus made and responded to, and having been decided by the court affirming such right, it was no longer an open issue, proper to be made again in the same case, between the same parties, and plaintiff was quite right in not accepting such issue and in tendering no evidence on same on the final trial.

In this case it appears from the record that a previous action had been filed in the Jefferson Circuit Court by Mrs. Brown, the wife of the decedent, who had been appointed, by the county court of Clark county, Indiana, administratrix of her husband's estate, that being the county of his residence at the time of his death, and that this suit had been dismissed at the instance of the defendant, because, as held by the court, the foreign administratrix could not sue in Kentucky on a demand of this kind. Thereupon, and within the year given by the statute, the Louisville Trust Company was appointed the administrator by the Jefferson County Court and so files this suit. And if the same objection is still to be heard to this right of action by the administrator in Kentucky, then the estate of decedent is without remedy, although a right of action is given to the administrator of any one killed in Kentucky by the gross negligence of a railroad company, its agents or employes. And thus the benefits of the statutes intended for the use of the widow and children of such an one would be lost and destroyed by the decisions of the courts in denying to both jurisdictions the right to appoint an administrator who can

maintain such an action. We scarcely think the courts should voluntarily involve themselves in such an absurdity, nor by decisions of this kind deliberately set themselves up to defeat the sovereign legislative will of the State, in an attempt to confer so material and just a benefit upon the widow and children of one so killed by the gross negligence of a railroad company.

We do not find that this question has been heretofore distinctly decided by this court, but deeming it of importance, and as presenting a case likely often to arise, we have thought proper to dispose of same.

Speaking strictly within the line of the General Statutes on this subject, defining when, under what circumstances and what courts shall have power to appoint an administrator for a non-resident decedent, it may be that the matter sued for in this action is not a debt, or demand belonging to or owned by the decedent at the time of his death. Neither is it strictly personal estate of the decedent. But beyond these general statutes we think the particular statute applicable to cases of this kind, wherein the right of action is expressly given to an administrator, necessarily implies the right to have an administrator appointed by the local courts for this purpose alone, if there be no other necessity or right or authority for such an appointment. And we deem the court of the county where the injury was done and where the man died the proper court to entertain such jurisdiction.

A further question presented by this record arises upon the action of the court below in giving a peremptory instruction to the jury to find for the defendant.

The evidence discloses that this accident happened on that part of the line of defendant's railroad in the city of Louisville running from the eastern end of the city south-

wardly, and westwardly to the western end of the city, and on that part of their track lying between Baxter Avenue and Broadway, a distance of something like ten thousand feet, running south from Baxter Avenue to Broadway. And that within this distance there are no streets or other public passways crossing defendant's line of railway, though there are streets both east and west of same (some distance off), and running parallel with the track of defendant.

It thus appears that this line of railway and road-bed, tracks and side tracks, switches, and all appliances necessary for the use of same, were the exclusive property of the defendant company, disconnected with any right of use in the public or in any individual members of the public, not a servant of the defendant corporation. It was while the decedent, Thomas Brown, was traveling along this right of way, going south from Baxter avenue to Broadway, that he was, on the 5th of November, 1891, run over and killed, in the open daylight, about 3 or 4 o'clock in the afternoon, by a freight train of the defendants being then moved along their tracks, in the same direction that plaintiff's decedent was traveling.

Quite a number of witnesses introduced by plaintiff speak of this accident, under divers circumstances, and at different places, in the vicinity, most of them speaking and noting the usual signal given by the railroad in case of danger—the regular alarm signal. Those of them who speak of the near approach of the train to the deceased, fix the distance as they saw it after coming from their several positions, and after hearing the repeated alarm signals, and they differ materially as to the time that elapsed between the first signal given and the time they first obtained sight of deceased and the approaching train. Some noticed decedent walking along

this track, with his back to the approaching train, and some say that before decedent was struck they think his foot was fastened in the frog, or between the rails of some of the several switches making off from the main track. Some witnesses say they saw another person attempting to pull decedent off the track from immediately in front of the near-approaching train; other witnesses claim to have noticed a shoe worn by the decedent pulled from the frog or switch, where it was fastened.

Some of the witnesses give the opinion that the train was moving at the rate of seven or eight miles an hour. The general theory of plaintiff seems to be that decedent's foot was fastened in the frog or switch, so that he could not release same, and thus he was run over by the train.

In all this testimony, however, we think we may say that none of the witnesses introduced by plaintiff undertook to say what had been done, or what was being done by the engineer and other employes of the railway company then operating said train to avoid any injury to deceased. No one for plaintiff professes to tell just where or when decedent came on the track, nor just where or when defendant's employes first discovered him in any dangerous or perilous position, with reference to the engine and cars of defendant.

Plaintiff's theory, even as to how this injury occurred, as set out in his original and several amended petitions, is not very clear or well defined. In his original petition he says it was by reason of the gross and wilful negligence of the defendants in this, that they did see the perilous position of decedent in time to have avoided the injury, or that they could have seen his perilous condition by the use of ordinary diligence for this purpose, complaining that the train was a heavy one and that the speed was too great, and that

the agents of defendant did not give the danger signal until it was too late to avoid the injury to decedent. And in their original petition they attribute the failure of the decedent to get off the track to the fact that his foot was fastened in a frog. By a later amendment they say they do not know whether it was a frog or a switch that decedent was fastened in.

In another amendment they say the brakes used on the train were insufficient, in kind and number, and too weak, to haul the train running at the rate of speed that it was traveling at the time the injury occurred.

And by a still later amendment they say that the train was imperfectly manned, not by a sufficient number of brakemen.

As to these several amendments and the charge made in and by them, we feel quite authorized to say that there was no evidence to show that the train was greater or heavier than trains generally transported. Nor was the speed shown to be at a dangerous rate, nor the brakes defective in any way, nor insufficient; nor that there was less than the usual number of brakemen then in position and service on the train.

It was claimed by plaintiff that this railway track and the embankment on which some of it was built was used by the public to a considerable extent, both at that time and for a considerable time before the accident. And plaintiff says that thereby it became and was a public highway, and that defendant failed to keep a lookout for decedent or other travelers on said highway.

Plaintiff's manner of interrogating the witnesses, as well as the line of argument in his brief, shows that he relies for a recovery upon these several matters of default and negligence of the railway company hereinbefore recited.

From the evidence we draw this conclusion, that the deceased, Thomas Brown, at the time of his death was a trespasser on the road of defendants; that he was a wrongdoer, there without right or authority.

We think the better doctrine is, that simple acquiescence on the part of a railroad company in the use of its track in this way does not confer authority or right, nor amount to license so to use.

That decedent being a trespasser and a wrongdoer at the time of his injury, had no right to complain of the size or weight of the train, nor of its speed (further than it should not be run in a city at a reckless and dangerous rate), nor of its machinery or brakes, that they were insufficient, nor that it was not properly manned.

All these things, so far as decedent was concerned, were purely matters within the sound discretion of the railroad company. True as to the general public at public crossings and to its own passengers the railroad company may owe all these duties, but not to plaintiff's decedent at the time and place of the injury.

The doctrine as to actionable negligence is that it must be a failure to discharge some duty devolved on the railroad company to the individual entitled to the right, and not for a failure of duty to others than himself.

So that a trespasser and a wrongdoer can not be heard to argue and say that the train was too heavy, or machinery insufficient, or that the train was imperfectly manned. There is this right, however, that belonged to the decedent as one of humanity, and that is, that it was the duty of the railroad company after becoming aware of his danger to use all reasonable care to avoid his injury, and this has been extended by the decisions of our court to include the duty on the part of the railroad company, its agents and employees,

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to keep a lookout along its line of railway, in cities where persons are likely to be found trespassing on its right of way, and this duty, so extended, is all that has been guaranteed to a trespasser and a wrongdoer. Along this line of duty imposed upon the railroad to the deceased, plaintiff's evidence fails to show any negligence on the part of the railroad company.

We do not recognize the necessity of any extension of this general statement of the doctrine. We think, from a careful review of the evidence in this case, that it failed to show any such negligence on the part of the railroad company whereby decedent came to his death. Neither the facts given in evidence by plaintiff's witnesses, nor any reasonable deduction fairly to be drawn from them, bring the case within the line of responsibility. Of course, in sustaining the court in giving a peremptory instruction to find for defendant, we base it solely on the testimony offered by the plaintiff; and while the court below declined at first to give this peremptory instruction, requiring the defendants to introduce their firemen and engineer, thinking, possibly, they might develop something in behalf of plaintiff's case, yet when they failed to do so, the court then gave the peremptory instruction.

We think the general view of the law of this case, herein indicated, is supported by the following decisions of our own court.

L. & N. R. Co. v. Lyter, 6 Ky. L. R., 223; *L. & N. R. Co. v. Howard's Admr*, 82 Ky., 212; *Nichol's Admr v. L. & N. R. Co.*, 9 Ky. L. R., 702; *Shackleford's Admr v. L. & N. R. Co.*, 84 Ky., 43; *John's Admr v. L. & N. R. Co.*, 10 Ky. L. R., 758; *L. & N. R. Co. v. Cooper's Admr*, 7 Ky. L. R., 102; *Johnson's Admr v. L. & N. R. Co.*, 91 Ky., 651; *Oatts v. C., N. O. & T. P. R. Co.*, 15 Ky. L. R., 87.

Wherefore the judgment of the lower court is affirmed.

Commonwealth v. East Tennessee Coal Co.

CASE 40—PETITION ORDINARY—APRIL 12.

Commonwealth v. East Tennessee Coal Co.

APPEAL FROM WHITLEY CIRCUIT COURT.

POWER OF STATE TO PRESCRIBE TERMS UPON WHICH FOREIGN CORPORATIONS MAY DO BUSINESS.—A State has no power to require a foreign corporation, as a condition precedent to its right to do business in the State, to surrender its privilege of suing in the Federal courts and of removing causes against it from the State to the Federal courts, that privilege being guaranteed to it as a citizen of another State by the constitution and laws of the United States. Therefore, section 572 of the Kentucky Statutes, which provides that "if any foreign corporation shall, without the consent of the adverse party, remove to a Federal court any action pending against it in any court of this State, or institute an action against a citizen of this State in a Federal court of this State, such action on the part of the corporation shall forfeit its right to transact or carry on any business in this State," is unconstitutional.

WM. J. HENDRICK, ATTORNEY-GENERAL, FOR APPELLANT.

The single question presented by this appeal is as to the constitutionality of the Kentucky statutes forbidding the removal of causes from State to Federal courts. The cases bearing upon the subject are: *Doyle v. Insurance Co.*, 94 U. S., 525; *Barron v. Burnside*, 121 U. S., 186; *Railroad v. Denton*, 146 U. S., 207; *Martin v. Baltimore R. Co.*, 151 U. S., 684.

S. G. HEISKELL AND S. V. D. STOUT FOR APPELLEE.

Section 572 of the Kentucky Statutes is unconstitutional, because it imposes upon foreign corporations doing business in Kentucky, conditions which are repugnant to the Constitution and laws of the United States. (*Barron v. Burnside*, 121 U. S., 186; *Ins. Co. v. Morse*, 20 Wall., 445; *Chicago, &c., R. Co. v. Becca*, 32 Fed. Rep., 849; *Doyle v. Ins. Co.*, 94 U. S., 535; *Southern Pac. Co., v. Denton*, 146 U. S., 207; *Martin v. Balt. & O. R. Co.*, 151 U. S., 684.)

JUDGE EASTIN DELIVERED THE OPINION OF THE COURT.

This appeal involves the constitutionality of sec. 572 of the Kentucky Statutes which is in these words, to-wit:

"If any foreign corporation shall, without the consent of the adverse party, remove to a Federal court any action pending against it in any court of this State, or institute an action against a citizen of this State in a Federal court of this State, such action on the part of the corporation shall forfeit its right to transact or carry on any business in this State; and such corporation, and any officer, agent or employe thereof, who shall thereafter transact or engage in any business or employment for such corporation in this State, shall be severally guilty of a misdemeanor, and, upon indictment and conviction in the circuit court of any county in which such corporation, or any officer, agent or employe thereof transacts or engages in any business, be fined for each offense not less than five hundred nor more than one thousand dollars."

Under this provision of the statutes, this action was brought by appellant in the Whitley Circuit Court for the purpose of having it judicially declared that appellee had forfeited its right to carry on business in Kentucky, and of enjoining it from doing so. In the petition, it is alleged that appellee is a foreign corporation, created by the laws of the State of Tennessee, but engaged for several years past in carrying on business in Whitley county in this State, and that on May 14, 1894, it had, by proper proceedings, procured the removal from the Whitley Circuit Court, of an action therein pending against it, to the Federal Court sitting at Frankfort, Ky., on the alleged ground that said suit involved a controversy between citizens of different States, and that this was done without the consent of the adverse party to said action. It is further alleged that, by this action, appellee has forfeited its right to carry on business in this State, but that, notwithstanding this fact, it is still engaged in carrying on its business in Whitley county, Ken-

tucky, and the court below is asked to decree the existence of the alleged forfeiture and to enjoin appellee from further continuing its said business in Kentucky.

To this petition a demurrer was filed by appellee setting forth, first, the usual grounds of a general demurrer, and presenting, as a second ground of demurrer, the fact that the petition shows on its face that appellant thereby seeks to impose on appellee conditions which are repugnant to the constitution and laws of the United States.

This demurrer was sustained by the court below, and appellant declining to plead further, its petition was dismissed, to which it excepted and prayed this appeal.

The sole question for our consideration, then, is, whether or not the section of the Kentucky Statutes above quoted, and upon which this action is based, is violative of the constitution or any of the laws of the United States, and to that question we will now briefly address ourselves.

It is manifest that the effect, as well as the purpose, of the statute in question, is to prevent the removal to a Federal court, by any foreign corporation doing business in this State, of any action brought against it in any court of this State. By the terms of the statute, the mere removal of the cause, without the consent of the adverse party, is made to operate as a forfeiture of all right on part of the corporation to transact any further business in this State, and it is thereby in effect excluded from doing business in the State.

The authority under which this right of removal is claimed by foreign corporations sued in a State court, is found in that provision of the Constitution of the United States, art. 3, sec. 2, which provides in effect that the judicial power of the United States shall extend to all controversies between citizens of different States and in the Acts of Congress, approved March 3, 1887, and August 13,

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1888, passed in pursuance thereof regulating the removal of actions from State to Federal courts, and amending what is known as the Judiciary Act of 1789.

It is only necessary for us to say in this connection that, under this provision of the Federal Constitution and of these acts of the National Congress, the right is given to a citizen of another State, sued in one of the courts in this State, upon compliance with certain proceedings prescribed therein, and which it appears from this record were complied with by appellee, to remove the action from the State to the Federal Court. And as to the citizenship of appellee, in the meaning and for the purposes of invoking the provisions of the constitution and the laws referred to, it is only necessary to say that it has been frequently adjudged by the Supreme Court of the United States, and is now settled, that a corporation is a citizen of the State by which it is chartered and that this Tennessee corporation is, therefore, a citizen of a State other than Kentucky.

In view of these admitted and well-settled propositions, then, had the legislature of this State the constitutional power to pass the act in question and can the courts of this State legally enforce the provisions of this act which denies to foreign corporations the right to do business in this State, unless they surrender the privilege thus guaranteed to them under the constitution and laws of the United States?

For the affirmative of this proposition it is contended that each State has the right to prescribe the terms and conditions upon which the corporations of other States may carry on business within its borders, that a corporation has no right, except by permission, to carry on business at all in any State except that of its incorporation, that it is within the power of the several States to exclude from their limits

all foreign corporations, and to deny them the privilege of doing business within their boundaries; and that this being the case, the corporation going into a foreign State to carry on business, must do so subject to any and all restrictions, limitations and conditions which that State may see fit to put upon it.

We admit the force of this reasoning and, if no authorities were furnished us, or if the question were before us as an original one, we might be inclined to give it more consideration than now seems necessary.

But it appears that the Supreme Court of the United States has several times been called upon to pass upon cases involving similar questions; and that, while recognizing the general doctrine that a State has the power to exclude foreign corporations from its limits or to prescribe terms on which they may do business within its territory; yet, that tribunal has fixed a limit beyond which the State may not go in the exercise of this power, and that limit seems to be, that it shall not prescribe terms, the effect of which will be to deprive the corporation of a right guaranteed to it by the constitution or the laws of the United States.

In the case of *LaFayette Insurance Co. v. French*, 18 How., 407, that court says:

"A corporation created by Indiana, can transact business in Ohio, only with the consent, express or implied, of the latter State. This consent may be accompanied by such conditions as Ohio may think fit to impose, and these conditions must be deemed valid and effectual by other States and by this court, *provided*, they are not repugnant to the constitution and laws of the United States, or inconsistent with those rules of public law which secure the jurisdiction and authority of each State from encroachment by all

others; or that principle of natural justice which forbids condemnation without opportunity for defense."

This same principle and this same limitation upon the power of a State to impose upon foreign corporations conditions precedent to their right to do business within its limits, is recognized in the case of *Ducat v. Chicago*, 10 Wall., 410, where it was said that, the power of a State to discriminate between its own corporations and foreign corporations desirous of transacting business within its jurisdiction being clearly established, it belonged to the State to determine the nature and extent of the discrimination, "subject only to such limitations on her sovereignty as may be found in the fundamental law of the Union."

And again, in the case of *Insurance Co. v. Morse*, 20 Wall., 445, where the court had under consideration a statute of the State of Wisconsin, which required foreign insurance companies, desiring to transact business in that State, first to enter into and file an agreement, in writing, not to remove any suit from the State to the Federal court, after stating the proposition that the constitution of the United States declares, that the judicial power of the United States shall extend to controversies between citizens of different States, it is said by the court, that, "the jurisdiction of the Federal courts, under this clause of the constitution, depends upon, and is regulated by, the laws of the United States. State legislation can not confer jurisdiction upon the Federal courts, nor can it limit or restrict the authority given by Congress in pursuance of the constitution. This has been held many times."

And further on the opinion says: "On this branch of the case the conclusion is this:

"First. The constitution of the United States secures to citizens of another State than that in which suit is brought

an absolute right to remove their cases into the Federal Court, upon compliance with the Act of 1789.

"Second. The statute of Wisconsin is an obstruction to this right; is repugnant to the constitution of the United States and the laws in pursuance thereof and is illegal and void."

It is true that the subsequent case of *Doyle v. Continental Insurance Co.*, 94 U. S., 535, has sometimes been considered as conflicting to some extent with the cases above referred to although the court in that case refers to, and expressly approves, the case of *the Insurance Co. v. Morse*, *supra*. And in the next succeeding case, that court disposes of *Doyle v. Continental Insurance Co.* by saying: "The point of the decision seems to have been that, as the State had granted the license, its officers would not be restrained by injunction, by a court of the United States, from withdrawing it. All that there is in the case beyond this, and all that is said in the opinion which appears to be in conflict with the adjudication in *Insurance Co. v. Morse*, must be regarded as not in judgment." *Barron v. Burnside*, 121 U. S., 199.

This last case involved the consideration of a statute of the State of Iowa, which denied to a foreign corporation the right to do business in that State, unless it would stipulate not to remove to the Federal Court any suit brought against it in the State Court, and the court in speaking to this point said: "Its right, equally with any individual citizen, to remove into the Federal Court, under the laws of the United States, such suits as are mentioned in the third section of the Iowa statute, is too firmly established by the decisions of this court to be questioned at this day; and the State of Iowa might as well pass a statute to deprive an individual citizen of another State of his right to remove such suits."

And in the conclusion of that opinion the court said: "In all the cases in which this court has considered the subject of the granting, by a State to a foreign corporation, of its consent to the transaction of business in the State, it has uniformly asserted that no conditions can be imposed by the State which are repugnant to the constitution and laws of the United States."

A similar statute was held unconstitutional and void by the same court in the later case of *Southern Pacific Co. v. Denton*, 146 U. S., 207; and then in the still later case of *Martin v. Balt. & Ohio R. Co.*, 151 U. S., 684, decided at the October term, 1893, the same doctrine is enunciated in these words:

"The Baltimore & Ohio Railroad Company, not being a corporation of West Virginia, but only a corporation of Maryland, licensed by West Virginia to act as such within its territory, and liable to be sued in its courts, had the right under the constitution and laws of the United States, when so sued by a citizen of this State, to remove the suit into the Circuit Court of the United States; and could not have been deprived of that right by any provision in the statutes of the State."

From this review of the decisions of the Supreme Court of the United States, it would seem that there is no longer any question as to the invalidity of legislation such as this act we are now considering. Those decisions establish the doctrine that this right of removal is a constitutional privilege conferred by the constitution and laws of the United States upon every citizen of a State, foreign to the State in which the suit is brought, which would clearly embrace all foreign corporations; and any legislation on part of the State, by which it is proposed or designed to take away that privilege, even under the power of the State to fix

the terms upon which the corporation may enter that State, for the purpose of doing business, is unconstitutional and void.

In accordance with these views we adjudge that section 572 of the Kentucky Statutes is unconstitutional, and that the demurrer of appellee to the petition filed against it by appellant was properly sustained.

Wherefore, the judgment of the lower court dismissing appellant's petition is affirmed.

CASE 41—PETITION ORDINARY—APRIL 12.

Commonwealth v. Jellico Coal Co.

APPEAL FROM WHITLEY CIRCUIT COURT.

CONSTITUTIONAL LAW—RIGHTS OF FOREIGN CORPORATIONS—PETITION TO RECOVER PENALTY.—Section 572 of the Kentucky Statutes is in conflict with the Constitution and laws of the United States, and, therefore, void. But even if it were valid it does not authorize an action by the Commonwealth to recover a penalty of a foreign corporation doing business in violation of its provisions. The remedy intended to be provided was by indictment and fine, and not by an action by the Commonwealth.

WM. J. HENDRICK, ATTORNEY-GENERAL, FOR APPELLANT.

S. V. D. STOUT FOR APPELLEE.

For statement of points and citations, see case immediately preceding this.

JUDGE EASTIN DELIVERED THE OPINION OF THE COURT.

This was an action brought by appellant on petition filed in the Whitley Circuit Court for the recovery from appellee of the sum of one thousand dollars as a fine or penalty.

97	246
119	338
119	340
119	341

The petition alleges, among other things, that appellee is a foreign corporation doing business in the State of Kentucky and in Whitley County, and that on April 25, 1894, without the consent of the adverse party, it removed to the United States Circuit Court sitting at Frankfort, Kentucky, a suit then pending against it in the Whitley Circuit Court, whereby under the laws of Kentucky, it forfeited its right to do business in Kentucky, and became liable to appellant for a fine of one thousand dollars for engaging in business thereafter, as it is alleged it has since continuously done, and whereby it became and is guilty of a misdemeanor. To this petition appellee filed a demurrer in two paragraphs, or upon two grounds, one of which was in terms a general demurrer, and the other based upon the alleged fact that the petition shows on its face that appellant seeks to impose upon it conditions which are repugnant to the Constitution and laws of the United States, and seeks to prohibit it from removing a cause from the State Court to the Federal Court and to recover from it a penalty for so doing.

This demurrer was sustained by the lower court, and appellant declining to plead further its petition was dismissed and it has appealed from that judgment.

The authority under which this proceeding was instituted is supposed to be section 572, Kentucky Statutes, and is in these words, to-wit: "If any foreign corporation shall, without the consent of the adverse party, remove to a Federal Court any action pending against it in any court of this State, or institute an action against a citizen of this State in a Federal Court of this State, such action on the part of the corporation shall forfeit its right to transact or carry on any business in this State; and such corporation, and any officer, agent or employee thereof, who shall

thereafter transact or engage in any business or employment for such corporation in this State shall be severally guilty of a misdemeanor, and, upon indictment and conviction in the circuit court of any county in which such corporation or any officer, agent or employe thereof, transacts or engages in any business, be fined for each offense not less than five hundred nor more than one thousand dollars."

A casual reading of this section of the statute, under which it is assumed that this action was intended to be brought, will show that the action as brought can not be sustained and that the demurrer thereto was properly held good.

It will be observed that there is no effort here to have appellee's right to do business in the State forfeited, or judicially declared to be forfeited, nor does it appear that any such proceeding has ever been taken.

The sole purpose of the action, as expressed in the petition and so far as the record shows, is to recover of appellee a fine of one thousand dollars. No such proceeding is authorized by the statute relied on. The provision of that statute is that the corporation committing the offense charged in the petition shall "upon indictment and conviction in the circuit court of any county in which such corporation * * * transacts or engages in any business, be fined for each offense not less than five hundred nor more than one thousand dollars."

The remedy of appellant, if any, for the recovery of this penalty, seems to be by indictment and conviction, and by a fine, and not by an action of this kind, which does not show that there has ever been either an indictment or conviction. On this ground, the demurrer was properly sustained, but, in addition to this, and for the reasons fully set forth in the

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opinion this day delivered in the case of Commonwealth v. East Tennessee Coal Co., *ante*, p. 246, with which this appeal was heard, it is the opinion of this court that the section of the statute above referred to is in conflict with the constitution and laws of the United States, and therefore void.

For the reasons in that opinion and herein above given, the judgment of the lower court dismissing the petition is affirmed.

CASE 42—PETITION ORDINARY—APRIL 13.

Brown, &c v. Holland, &c.

Campbell v. Dabney.

97	249
97	389

97	249
1127	413

APPEALS FROM CHRISTIAN CIRCUIT COURT.

1. **ELECTION OF COUNCILMEN BY WARDS.**—Under section 160 of the Constitution, the General Assembly has power to provide as to cities of the fourth class, as it has done, that councilmen "shall be elected by a majority of the votes cast by the qualified voters of the wards for which they respectively stand," it not being necessary that they should be elected by the voters at large before it can be said they are "elected by the qualified voters of the city."
2. **SAME.**—The charter for cities of the fourth class recognizes the existence of wards in such cities, and in effect continues the ward divisions existing under old charters.
3. **ELECTION OF MAYOR BY COUNCIL—DELEGATION BY LEGISLATURE OF ITS POWER TO MUNICIPAL CORPORATIONS.**—While the general rule is that the Legislature can not depute others to perform its governing functions, yet it may delegate to municipal and other public corporations some portion of its own powers for local purposes. Therefore, under section 160 of the Constitution, which provides that mayors of town of the fourth, fifth

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and sixth classes "may be elected or appointed, as provided by law," the Legislature has power to provide, as it has done as to cities of the fourth class, that "the mayor may be selected by the people or appointed by the council, as may be provided by ordinance." Nor is this provision in violation of section 156 of the Constitution, requiring the organization and powers of each class of cities "to be defined and provided by general laws so that all municipal corporations of the same class shall possess the same powers and be subject to the same restrictions."

4. ELECTION NOT INVALIDATED BY CERTAIN IRREGULARITIES.—As the Constitution permitted, and the act for the government of cities of the fourth class required, the election of councilmen by the voters of each ward, and the city council in the absence of any specific directions by the General Assembly as to how these ward elections were to be held did all in its power to comply with the Constitution and the act, both the council and the county judge appointing the officers to hold the elections in the respective wards as required by the charter, and the city clerk furnishing the ballots under authority of the council upon the refusal of the county clerk to do so, these irregularities did not invalidate the election.
5. IN THESE ACTIONS TO PREVENT THE USURPATION OF THE OFFICES OF MAYOR AND COUNCILMEN, in which the plaintiffs ask judgment, placing them in possession of the offices which they respectively claim, plaintiffs must recover upon the strength of their own titles, and have no interest in the settlement of any question which merely affects the titles of the defendants without giving validity to their own titles.

J. I. LANDES, J. W. DOWNER AND JAMES BREATHITT FOR APPELLANTS.

1. The only lawful method of choosing mayors of cities of the fourth class (the city of Hopkinsville being one of that class) is prescribed by the first clause of sec. 160 of the Constitution, which is that of election "by the qualified voters" of such cities, and the board of council of the city of Hopkinsville had no lawful or constitutional power or authority to change or fix the method "by ordinance," and require the mayor of Hopkinsville to be appointed by the board, and thus take from the people of the city the constitutional right they had to elect their own mayor. While the General Assembly has the power to provide, *by the enactment* of a law, a method of selecting or choosing mayors and police judges in the cities of the fourth class, other than by the

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qualified voters of such cities, yet in the absence of such a law *fixing a uniform method of choosing these officers in all cities of this class*, the method prescribed in the Constitution—election by the qualified voters of the cities—must prevail.

The power conferred upon the General Assembly to enact laws can not be delegated by that body to any other body or authority. (Cooley's Const. Limit., 117; Cooley on Taxation, 61-64; Dillon on Mun. Corp., secs. 60, 567, 618; State v. Young, 29 Minn., 474; People v. Nevada, 6 Cal., 143; *Ex parte* Wall, 48 Cal., 279, 313; Tilley v. Savannah, &c., R. Co., 5 Fed. Rep., 641; Cincinnati, &c., R. Co. v. Clinton Co., 1 Ohio St., 77; Hydes & Goose, Ass'ees, &c., v. Joyes, 4 Bush, 464; The Auditor v. Holland, &c., 14 Bush, 147; Commonwealth v. Weller, *Idem*, 218; Clarke, &c., v. Rogers, &c., 81 Ky., 48; Burnside v. Lincoln County Court, 86 Ky., 425; Slack, &c., v. Maysville, &c., R. Co., 13 B. M., 22.)

2. The only lawful method of choosing members of boards of council of cities of the fourth class is that of election "by the qualified voters" of such cities, as provided in sec. 160 of the Constitution, which means, *ex vi termini*, "the qualified voters" of such cities at large; and the provision of sec. 4 of the act for government of cities of the fourth class (chap. 241 of Session Acts of 1891-2-3, p. 1211), allowing, or requiring, members of boards of council of such cities, in any event, to be elected "by wards," is unconstitutional and void.
3. Whatever power the General Assembly may have under the Constitution to require or allow members of boards of council of cities of the fourth class to be elected by wards, in contradistinction to electing them by the "qualified voters" at large, the provisions of the old charter of the city of Hopkinsville, in force at the adoption of the present Constitution, by which the city was divided into wards, was repealed, or abrogated, under the operation of sec. 166 of the Constitution, when the act for the government of cities of the fourth class went into effect, that is, on the 28th day of June, 1893; and no wards have since that time been established in the city of Hopkinsville, and none were in existence at the November election, 1893.
4. All elective officers of all cities and towns in the Commonwealth were required, by sec. 167 of the Constitution to be elected at the "general election" in November, 1893, which was the "one election" for that year allowed by sec. 148 of the Constitution, and which means the election provided for by the act entitled, "An act to regulate elections in this Commonwealth," approved June 30, 1892 (chap. 65 of the Session Acts of 1891-2-3), and conducted by the election officers appointed by the county judges

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under the said act, which act contained *sufficient* and *exclusive* provisions for the election of members of the boards of council of all cities of the fourth class at the November election, 1893, in the manner required by the Constitution.

R. T. PETREE, JOE MCCARROLL, HUNTER WOOD, J. T. HAN-
BERRY AND J. B. ALLENSWORTH FOR APPELLEES.

1. The legislature did not intend by the adoption of the charter of cities of the fourth class to repeal any act or ordinance by which any city of the fourth class had previously been divided into wards. (Ky. Stats., sec. 3490, subsec. 33.)
2. The charter of fourth class cities is in perfect harmony with sec. 156 of the Constitution.
3. Sec. 160 of the Constitution does not require the mayors and boards of council of all cities and towns in Kentucky to be elected by the qualified voters *at large* of such cities or towns.
4. Appellants, like plaintiffs in ejectment, must recover upon the strength of their own title, and not upon the weakness of their adversary's.
4. The law leaving to the legislative board of each town of the fourth class the right and power to determine by ordinance whether the mayor and police judge of such town should be elected by the people or by the members of the board of council is not unconstitutional. While the general rule is that the legislature can not delegate its general powers of legislation to any other body or authority, this rule has many exceptions. (Slack v. Maysville & Lexington R. Co., 13 B. M., 23; Sutherland on Statutory Construction, secs. 70-75.)

JUDGE HAZELRIGG DELIVERED THE OPINION OF THE COURT.

The questions involved in these appeals relate to the legality of the election of mayor and councilmen of the city of Hopkinsville, under the provisions of the constitution, and the act for the government of cities of the fourth class.

The action first named was brought by the appellants Brown and others to prevent the usurpation of the office of councilmen of the city named by the appellees Holland and others; the other was brought by the appel-

lant Campbell to prevent the usurpation of the office of mayor of that city by the appellee Dabney. In each case judgment was asked to place the appellants in possession of the offices which they respectively claimed. No objection is suggested against any of the parties on the score of qualification or eligibility. The appellants, Brown and others, were severally voted for by the qualified voters at large of the city, at the general election on the 7th day of November, 1893, held by the precinct officers appointed by the county court of Christian county, with ballots furnished by the county court clerk. There were four of these election precincts, and they embraced all the territory within the limits of the city and some outside of such limits.

The appellees, Holland and others, were voted for on the same day by the qualified voters of the wards of the city, of which there were seven, the voters of each ward voting for only one member of the council, and the election being held in each ward by officers appointed by the city council, and with ballots provided by the city clerk. The appellant Campbell was elected mayor by the qualified voters of the city at the same general election held at the four precincts; while the appellee Dabney was appointed mayor by the council on the first Tuesday in January, 1894, in pursuance of an ordinance of the council adopted on September 5, 1893, providing for such appointment.

It is contended by the appellants: First, that the only lawful method of choosing members of boards of council of cities of the fourth class—the city of Hopkinsville being one of that class—is that of election by the qualified voters of such cities as provided by section 160 of the constitution, which means, by force of the language used therein, election by the qualified voters *at large*; and that the provisions of section 4 of the act for the government of cities of

the fourth class (chap. 241, acts of 1891-2-3, p. 1211) allowing or requiring such members in any event to be elected "*by wards*" is unconstitutional and void.

Second, That however this may be, the provisions of the old charters by which these cities were divided into wards were repealed or abrogated under the operation of section 166 of the constitution, when the act for the government of cities of the fourth class went into effect, that is, on the 28th of June, 1893, and no wards have since that time been established in the city of Hopkinsville, and none were in existence at the November election, 1893.

Third, That elective offices in all cities and towns were required by section 167 of the constitution to be filled at the general election in November, 1893, which was the "one election" for that year allowed by section 148 of the constitution, and which was provided for by the general election law approved June 30, 1892 (chap. 65, acts 1891-2-3) and conducted by officers appointed by county judges with the official ballots furnished by the county court clerks.

Fourth, That the only lawful method of choosing mayors of cities of the fourth class is prescribed by the first clause of section 160 of the constitution, which is that of election by the qualified voters of such cities, and the board in this instance had no constitutional power to fix the method by "ordinance" and require the mayor to be appointed by the board. That the attempt by the General Assembly to delegate such power to the boards of councils of such cities is unauthorized by the constitution.

For the appellees it is contended, and was so held by the court below: First, that members of legislative boards of all cities, save those of the first and second classes, might be elected by the qualified voters thereof, voting by wards or at large, and in cities of the first and second classes such

members were to be elected by the qualified voters *at large* as expressly required by the constitution. That members of such boards in cities of the fourth class might therefore be elected by wards, or at large, as might be provided by the General Assembly. That in pursuance of this construction of the constitution the General Assembly did provide that in such cities of the fourth class as were divided into wards, the members of such boards should "be elected by the qualified voters of the wards" for which they respectively stood, otherwise by the qualified voters of the city. That the division of the various cities in the Commonwealth into wards in so far as they were so divided was recognized by the constitution, and in no wise interfered with either by that instrument or by the laws enacted by the General Assembly for the government of such cities. That in the city of Hopkinsville, being a city divided into wards, the "ward" election, at which the appellees were elected, was held in accordance with the provisions of the statute and the constitution, from which it follows that the appellants, Brown and others, were not legally elected.

Second, That under the provisions of section 160 of the constitution, mayors of cities of the fourth class might be appointed or elected, as provided by law; that by the act for the government of cities of that class, it was provided that the mayor might be elected by the people or appointed by the council, as provided by ordinance, and that such an ordinance was adopted, and the appellee Dabney appointed mayor in strict accordance with the provisions of the constitution, the act governing fourth class cities and the ordinance of the board on that subject. That the appellant Campbell was not so appointed, and is therefore not entitled to the office.

We shall consider the case of the councilmen first. So

much of section 160 of the constitution as will be necessary to notice in this connection is as follows: "The mayor or chief executive, police judges, members of legislative boards or councils of towns and cities, shall be elected by the qualified voters thereof: *Provided*, the mayor or chief executive and police judges of the towns of the fourth, fifth and sixth classes may be appointed or elected as provided by law * * * * When any city of the first or second class is divided into wards or districts, members of legislative boards shall be elected at large by the qualified voters of said city, but so selected that an equal proportion thereof shall reside in each of the said wards or districts; but when in any city of the first, second or third class, there are two legislative boards, the less numerous shall be selected from and elected by the voters at large of said city; but other officers of towns or cities shall be elected by the qualified voters therein or appointed by the local authorities thereof, as the General Assembly may, by a general law, provide. * * * "

Section 4 of the act for the government of cities of the fourth class, approved June 28, 1893, and in force from that date, is as follows: "The members of the board of council shall be elected the first Tuesday after the first Monday in November every two years; shall be residents of the wards they represent, and shall be elected by a majority of the votes cast by the qualified voters of the wards for which they respectively stand: *Provided*, The city is divided into wards, otherwise they shall be elected by a majority of the votes cast by the qualified voters of the city, of which they must be residents," etc.

In our search, therefore, to ascertain the meaning of the words "shall be elected by the qualified voters thereof" in section 160 *supra*, we are met with a legislative construc-

tion which authorizes an election of members of such boards by a majority of the votes cast by the qualified voters of the wards of such cities as may be divided into wards. The question is, therefore, is this legislative construction so repugnant to the obvious meaning and intent of the provisions of the constitution as to require judicial condemnation?

In other words, when the constitution requires members of legislative boards of towns and cities to be elected by the qualified voters thereof, must they be elected by the voters at large before it can be said that they are elected by the qualified voters of the city? And when such members are elected by the qualified voters of the wards of a city can it be said that they are not elected by the qualified voters of the city?

In this connection, it is to be observed that the clause in question is followed by the proviso that the mayor and police judges of certain cities may be appointed or elected, and we are urged to draw the inference that the intent of the framers of the constitution was simply to declare that the offices of members of municipal boards should be elective and not appointive, the manner of the election, whether by wards or at large, not being particularly under consideration. It is also to be seen that another significant clause follows in which the words "at large" are used, and from which it is argued that the election provided for in the first clause, in which those words are omitted, might be held by the qualified voters of the city, voting either at large, or by wards.

The provision is: "When any city of the first or second class is divided into wards or districts, members of legislative boards shall be elected *at large* by the qualified voters of said city, but so selected that an equal proportion thereof

shall reside in each of the said wards or districts; but when in any city of the first, second or third class, there are two legislative boards, the less numerous shall be selected from and elected by the voters at large of said city."

If the clause, "members of legislative boards or councils of towns and cities shall be elected by the qualified voters thereof" can fairly mean only that they are to be so elected "at large," it is difficult to escape the conclusion that much useless repetition has been indulged in by the framers of the constitution. It can not be that solely for the purpose of providing that an equal proportion of the members should reside in each of the wards, it was found necessary to use the words "at large." Without these words, the clause, "but so selected that an equal proportion thereof shall reside in each of said wards or districts," conclusively negatives the idea of an election by wards, because an election by wards would necessarily require an equal proportion of members to reside therein, and the provision would be superfluous. The use of these words, "at large," in providing for elections in cities of the first and second classes, seems strongly to authorize, by implication at least, a different mode of election as to other towns and cities. They are seemingly used to emphasize the method to be adopted in elections of members in cities of the first and second classes, and distinguish it from that to be used in all other classes. Not that in other classes the method *must* be different, but that it *may* be. The use of the significant words in the one case and the omission of them in the other present the two methods in contradistinction, the one from the other.

Moreover, the language of the first clause does not in terms preclude an election by wards. The learned judge below aptly says in this connection: "Of this section (160) it

may be said generally that in speaking of the legislative boards, it says 'members' of said boards shall be elected by the qualified voters of said city or town, using the plural number, 'members.' It does not say that each individual member shall be elected by the voters of the city, but that the members in the aggregate shall be so elected. Following this language literally, the members of said board in the aggregate have been so elected by the voters in the aggregate of said city. No single member has been elected by any other than the qualified voters of the city, and every qualified voter of the city has had an opportunity to vote for a member of said board of council." The debates in the convention conclusively sustain this construction.

The section as first reported by the committee having the matter in charge read thus: "The mayor or chief executive, police judges, members of legislative boards or councils and of school boards of towns and cities shall be elected by the qualified voters thereof. * * * * When any city or town is divided into wards or districts, members of legislative and of school boards shall be elected at large by the qualified voters of said town or city, but so selected," etc.

The distinguished chairman of the committee in deference to what he declared to be the demands of the smaller towns and cities, and for the reason that it secured to them the supremacy in governmental affairs of the more intelligent element in such cities and towns, amended the section in behalf of the committee, so that the second clause read as follows: "When any city *of the first or second class* is divided into wards or districts, members, etc., shall be elected at large," etc.

Of this amendment, a prominent delegate said: "I hope this amendment will pass. It applies to my town (Hop-

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kinsville) which has been governed for twenty years by people who own but a small portion of the property, but we have at last got a ward system in the city by which property-owners are able to govern the town themselves. I hope you will adopt the amendment, because otherwise it would put us back under the control of the irresponsible rabble."

After reading the section as amended a distinguished member of the committee said: "Now, it does not take away from the legislature the power, by general laws, to regulate the mode in which the legislative boards of towns, *other than of the first and second class*, shall be arranged. If hereafter the legislature should want to provide a mode of representation in these towns by electing from the town at large, it could do so. This does not provide for one way or the other, but leaves it with the legislature, and does not interfere with these little towns, such as the one represented by the gentleman from Christian county, but is *simply applicable to cities of the first and second class*." And the committee amendment appears to have been agreed to without division. (Debates, Constitutional Convention, vol. II., pp. 2905-6.)

However, if, as contended, the provisions of the old charter dividing the city into wards were repealed by the new charter or act for the government of cities of the fourth class, and the wards thus abrogated under the operation of the constitution, the law providing for ward elections is not to be applied, in which event the appellants, as they were elected "by a majority of the votes cast by the qualified voters of the city," are entitled to the offices.

The contention is that the "ward" law of January, 1890, dividing the city into seven wards, being an amendment of the old charter of the city, was abrogated and repealed

by the act for the government of cities of the fourth class, adopted June 28, 1893. That section 166 of the constitution provided for a continuance in force of the acts of incorporation of cities and towns and all amendments thereto until such time as the General Assembly shall provide by general laws for the government thereof, and therefore, say counsel, "the date of the passage of any such act for the government of any class of cities, is the limit of the periods of existence of previously existing acts of incorporation and amendments thereto, of all cities belonging to that class of municipalities." This argument seems to be sound enough, but nevertheless if when the act for the government of cities of the fourth class came to be adopted, the existence of ward-divisions therein was recognized and in effect continued, the conclusion that the wards thereof are abolished or obliterated is erroneous. And it seems to us that the act of June 28, 1893, does recognize the existence of wards in such cities, and in effect continues the ward-divisions. Thus in sub-section 32 of section 9 it is provided that "said board of council may change the boundary line of any ward or wards of any city *now divided into wards*, or hereafter divided into wards under the provisions of this act," etc.

Other references to the division of such cities into wards in the present tense are made in sections 3 and 4 of the act, and while these references may possibly refer to some future division into wards, we do not think such is the meaning of the references. It seems absolutely inconsistent that the legislature would grant the council the power to change the boundary lines of wards in existence at the time of the passage of the act, if upon its passage and by reason thereof, those wards became obliterated.

By the ordinance of September 5, 1893, the boundaries

of the wards in Hopkinsville were changed and fixed definitely, and the succeeding election held therein accordingly.

It is said, however, that the one election for each year, provided for in section 148 of the constitution, was that of the general election held by the officers required to be appointed in pursuance of the general election law. This is doubtless true. The appellants, however, are not concerned in the settlement of this question. If the appellees were not elected in strict accordance with the requirements of the general election law, that fact does not give validity to the title of the appellants upon the strength of which alone they can recover the office. They are concerned in the determination of the questions whether the election "by wards" was authorized by the constitution, and whether the ward system was continued by the act of June 28, 1893, because, if not so authorized and continued, the appellees were not only not elected, but the appellants were. But if constitutional authority exists for the ward elections, and such wards in fact existed, the appellants claiming the offices of councilmen have no further interest in the controversy.

So, also, we may say in this connection, the appellant Campbell claiming the office of mayor is not interested in the question whether or not the appellee Dabney was appointed by a board of councilmen, in all respects elected in pursuance of the general election law.

The only question he is concerned about is whether the appointive method for choosing a mayor, provided for in the act for the government of cities of the fourth class, and pursued in the selection of the appellee Dabney, was authorized by the constitution; for, if so, the appellant's election,

having been by a different method, is void. And this question we will now consider.

The language of the act is: "The mayor may be elected by the people or appointed by the council, as may be provided by ordinance." (Sec. 3, ch. 241, acts 91-2-3.)

The constitutional provision is that mayors of towns of the fourth, fifth and sixth classes "may be appointed or elected as provided by law." (Sec. 160.)

The contention is that the legislature can not delegate to the various boards of council the right to provide the manner in which the mayors of these cities may be selected, but must itself provide the manner. And, moreover, that such a delegation of power is in violation of section 156 of the constitution, requiring the organization and power of each class of cities "to be defined and provided by general laws, so that all municipal corporations of the same class shall possess the same power and be subject to the same restrictions."

The general rule that the legislature can not deputize others to perform its governing functions is well settled. (Cooley's Const. Lim., 6th ed., 137.)

It, however, "may delegate to municipal and other public corporations some portion of its own powers for local purposes, the general rule being that it may authorize others to do things which it might properly, yet can not understandingly or advantageously do itself." (19 Am. & Eng. Ency., 464, and cases there cited.)

In *Thompson v. Floyd*, 2 Jones L. (N. C.) 313, cited by Mr. Sutherland in his work on Statutory Construction (sec. 70), it is said: "Neither is it necessary for us to consider the general question whether the General Assembly can delegate any portion of its legislative functions to any man or set of men, acting either in an individual or corporate capacity.

That it may, has been too long settled and acquiesced in by every department of the government and by the people, to be now disputed or even discussed. The taxing power is, unquestionably, a legislative power, and one of the highest importance, and yet has, ever since the adoption of the constitution, been partially delegated to the justices of the county court, and to every incorporated city, town and village throughout the State. . . . The truth is, that in the management of all the various and minute details which a highly civilized and refined society requires, the General Assembly must have, and are universally conceded to have, the power to act by means of agents, which agents may be either individuals or political bodies, most generally the latter. Without such power the legislature would be an unwieldy body, incapable of accomplishing one-half the great purposes for which it was created."

In *Slack v. Maysville & Lexington Railroad Company*, 13 B. M., 1, it is said that the legislative will is ordinarily enforced by the judiciary or the executive, or by both combined. "But the legislature is not restricted," says the court, "to these agencies. It may select or appoint others, as is often done, when the object of the law is to accomplish local or individual purposes. The agency generally employed for applying the legislative will and the power of the government to purposes merely local, has been that of county courts for counties, and of trustees of towns or the municipal authorities of cities for towns and cities, which, to the extent of the powers permanently or temporarily vested in them, and whether allowed a discretion or not, do but carry into effect the legislative will and power."

In considering a different branch of this case, we have seen a manifest purpose, on the part of the framers of the constitution, to provide a local government best suited to

the needs and conditions of the cities and towns of the Commonwealth, and it would seem at least to be in accord with that purpose if the legislative department of these cities and towns might be left free to adopt such method of choosing their chief executive as, in its judgment, would secure the best results.

Nor do we think that the provision for the election or appointment of this officer is in conflict with sec. 156 of the constitution, requiring the organization and powers of each class of cities and towns to be defined and provided for by general laws, and all municipal corporations to possess the same powers and be subject to the same restrictions.

It seems to us the organic structure of a city government with an appointed mayor is not one on that account different from that of a city government in which the mayor is elected by the qualified voters. As said by the learned judge below: "A mayor is equally a mayor with the same powers and subject to the same limitations whether chosen by a vote of the people of the city at large or, whether selected or chosen by the board of council," and certainly, it seems to us, the powers and the restrictions therein of all municipal corporations may be defined and provided for by general laws whether the office of mayor be filled in the one way or the other.

From what we have said it follows that the judgments below dismissing the petition of the appellants Brown and others, and of the appellant Campbell, are correct, whether or not the appellees are respectively entitled to hold their offices.

We have seen that the constitution permitted, and the act for the government of cities of the fourth class required, the election of councilmen by the voters of each ward, but by in-

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advertence, as we suppose, there was no method pointed out by the General Assembly how to hold these ward elections, if the ward-limits did not correspond with the limits of the general voting precincts as fixed by the county court. This has since been fully remedied. (§3485 Ky. Stat.) In the absence of any specific directions on the subject, the council did all in its power to comply with the constitution and the act. It appointed the officers to hold the election in the respective wards as required by the charter. The county judge also appointed the same officers. The county clerk declining to furnish the ballots for the ward elections, the city clerk did so under the authority of the council. In all other respects the election was conducted as required by the general law. We are of the opinion that the irregularities indicated did not invalidate the election of the appellees, and that they hold their respective offices as if elected in strict conformity with the general election laws.

Wherefore the judgment in each of the cases is affirmed.
Judge Guffy dissenting.

CASE 43—INDICTMENT—APRIL 13.

Breckinridge v. Commonwealth,

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APPEAL FROM BALLARD CIRCUIT COURT.

1. **TO MAKE ONE ELIGIBLE AS SPECIAL JUDGE** in a particular case it is not necessary that he should be a resident of the district in which the case is pending.
2. **CONSTRUCTION OF STATUTES.**—Where the Legislature enacts a law in substantially the same language as a former law upon the same subject, it must be presumed to have accepted the construction given the old law by the persons charged with its enforcement.
3. **ROBBERY** is the felonious taking of property from the person of another by force.
4. **AN INDICTMENT FOR ROBBERY** which charges that the property was feloniously taken from M against his will and by force and by presenting pistols and other weapons at him, and by putting him in the fear of immediate injury to his person, the property being at the time in his possession, is sufficient, although it does not expressly charge that the property was taken from the person of M, it being impossible to draw any other conclusion from the language used than that it was so taken.
5. **EVIDENCE.**—The indictment having been dismissed as to one of the defendants, who, being introduced as a witness for the Commonwealth, confessed his own guilt and implicated his co-defendant, who was being tried, it was not improper to permit the Commonwealth to show that this witness had, prior to the dismissal as to him, offered to plead guilty, this testimony being offered by the Commonwealth only after a long cross-examination of the witness, indicating that his good faith in the confession of his guilt and the implication of his co-defendant was questioned.
6. **SAME—CONTRADICTION OF WITNESS.**—It was not improper to refuse to permit the defendant to prove that the prosecuting witness for the Commonwealth had stated soon after the robbery and before the arrest of the defendants that the persons who committed the robbery were thoroughly masked at the time and that they did not recognize them, these witnesses having admitted that they had frequently made such statements, although they did not remember making the particular statements at the time and place laid.
7. **THE ARGUMENT OF THE ATTORNEY FOR THE COMMONWEALTH IN**

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urging the jury by considerations of public policy to the enforcement of the criminal law and to the conviction of the accused was within the line of duty of a public prosecutor.

SAMUEL K. CROSSLAND FOR APPELLANT.

1. Defendant's objection to C. H. Thomas acting as special judge should have been sustained. A special judge is required to have the qualifications of a circuit judge, and one of those qualifications is a residence in the district for two years next preceding his election. (Ky. Stats., sec. 968; Const. of Ky., secs. 129, 130.)
2. The indictment is fatally defective as an indictment for either robbery or larceny, because it does not charge that the money was taken *from the person or in the presence* of E. B. McNeal. (1 Wharton's Am. Crim. Law (9 ed.), secs. 846, 847, 849; East's Pleas of Crown., p. 707; *Idem*, foot note, 3; Glass v. Commonwealth, 6 Bush, 437; Commonwealth v. Brooks, 1 Duv., 151.)
3. Acts, declarations or confessions of one jointly indicted with another can not be given in evidence against the other. (Frost & Hays v. Commonwealth, 9 B. M., 362; Thompson v. Commonwealth, 1 Met., 14; Jones v. Commonwealth, 2 Duv., 554; Hudson v. Commonwealth, 2 Duv., 531; Shelby v. Commonwealth, 13 Ky. Law Rep., 178; Shelby v. Commonwealth, 15 Ky. Law Rep., 553.)
4. The court erred in rejecting testimony as to statements by Clark to the effect that he could not identify the guilty parties, because they wore masks.
5. As the statements of Brown show him to have been an accomplice, his testimony should have been excluded, because it was not corroborated by any proof whatever. (Bowling v. Commonwealth, 79 Ky., 605.)
6. The judgment should be reversed, because there was no evidence tending to establish guilt. (Shelby v. Commonwealth, 15 Ky. Law Rep.)

WM. J. HENDRICK, ATTORNEY-GENERAL, FOR APPELLEE.

JUDGE GRACE DELIVERED THE OPINION OF THE COURT.

The appellant, James Breckinridge, in connection with Wm. O'Bryan and Frank P. Brown, having been indicted by the grand jury of Ballard county for robbery, and tried and convicted and sentenced by the circuit court

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of that county to ten years' confinement in the State penitentiary in accordance with the verdict of the jury, now prosecutes this appeal.

The first objection urged is to the special judge who tried the cause, the defendant having filed his affidavit objecting to the Hon. N. P. Moss, the circuit judge of that district. Thereupon, the clerk of the court, as required by the statutes in such cases, proceeded to hold an election for a special judge, whereupon the Hon. C. H. Thomas was duly elected. Thereupon, the defendant objected to the said Thomas on the ground that said Thomas was not a resident of the first judicial district, where this indictment was pending, it being conceded, however, in the record that he possessed all the qualifications required by the constitution and laws of this State for a circuit judge, and that he was a regular practitioner of the bar in Ballard county, and that he was not interested in or employed in this cause.

While it is true that the constitution does require a residence in the district to make one eligible for the *office of circuit judge* in that district wherein he is elected, there is no such requirement as to a special judge chosen for some particular case; the statute instead requires that he shall be chosen from the members of the bar and that he shall have the qualifications of a circuit judge; but not the residence in that district necessary for the office of circuit judge.

A provision substantially similar is made applicable where the lawyers present fail in making an election; thereupon, it is the duty of the Governor to appoint some one to try that particular case. It has never been the practice in the State so far as we are advised to limit the election or the designation by the Governor to some lawyer

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resident in that particular district where the cause is pending. The statutes now applicable are substantially the same as those heretofore in force in Kentucky, and we assume that the legislature knew the construction given to the old law, and failing to make any change by the new law must be presumed to have accepted the construction heretofore given.

A second objection is to the indictment under which appellant was tried and convicted, a demurrer having been duly filed, overruled and exceptions taken.

The indictment reads as follows, viz.:

"The grand jury of Ballard county, Kentucky,..... and by the authority of the Commonwealth of Kentucky, accuse James Breckinridge, William O'Bryan and Frank P. Brown, of the crime of robbery, committed in the manner and form as follows, viz.: The said James Breckinridge, William O'Bryan and Frank P. Brown, in the said county of Ballard, on the 11th day of November, 1893, and before the finding of this indictment, did feloniously take from E. B. McNeal, nineteen hundred dollars (\$1,900.00), the same being gold and silver and United States currency, good and lawful money of the United States, and of the value of nineteen hundred dollars (\$1,900.00), said money at the time being in the possession of said E. B. McNeal, as the agent of the American Express Company, and others, to the grand jury unknown, against the will of said E. B. McNeal, and by force, and by presenting pistols and other weapons at him, the said McNeal, and by putting him, the said McNeal, in the fear of immediate injury to his person, against the peace and dignity of the Commonwealth of Kentucky."

This indictment appears to have been drawn with great care, embracing and charging every essential element of the crime of robbery, designating the crime by its appropriate

name of robbery, naming the persons accused by the grand jury, charging that the offense was committed feloniously, designating the property taken, and fixing a value on same, alleging that it was *then*, at the time it was taken, in the possession of McNeal, as agent of the American Express, that it was taken from him, that this was done against the will of McNeal, and by force, designating the particular means used, and that it was by putting him, the said McNeal, in fear of immediate injury to his person, and all against the peace and dignity of the Commonwealth of Kentucky.

These several allegations as to the commission of the offense are set out with far greater particularity than the definitions given by some of our text writers seem to require.

Mr. Greenleaf quotes and commends highly an early definition given by Lord Mansfield as follows: "Robbery is the felonious taking of property from the person of another by force." (3 Greenleaf on Evidence, 14th ed. sec. 223.) This definition, Mr. Greenleaf says, is most comprehensive and precise and apt; it does not embrace a charge that the taking was against the will of the person robbed, neither does it say in express terms that the property taken was in the actual possession of the person injured at the time of the taking, nor that it was carried away, nor that it was taken in the presence of the owner. Nor does it allege ownership at all, nor does it say that it was taken by putting the party in fear of injury to his person. And yet the same author proceeds to point out how this condensed definition, by construction and intendment of law, may at once be made sufficiently expansive to embrace every manner of the offense of robbery, as that this possession may be either actual or constructive, in that

it the property taken may be lying on the ground in the presence of the owner. And as to the force used, that it may be physical violence directly applied, or constructive by threats, or otherwise putting him in fear, and thereby overcoming his will. Other cases are found as where a person is knocked down and while insensible his property is taken. Here the law presumes it to be against *his will*. And again where force and threats of present violence with assault are such as may be reasonably presumed to excite fear, that there fear will be presumed, and need not be directly proven. Numerous cases are cited illustrating that this carrying away is little if any thing more than formal, as the slightest removal from a former position is sufficient; but it must be taken. Again it is said by our text writers that these several constructions and implications and intendments of the law are given because of the heinousness of the offense against both person and property, and of the odium in which it is justly held by the law. Again, by repeated adjudications has this law of robbery been extended so as not only to include fear of personal violence, but fear of the loss of his property, fear that his child in possession of the persons intending the robbery may be killed, fear that he may be accused of an unnatural crime.

When to these several extensions and judicial constructions and intendments of the courts applied in cases of robbery, we add the provisions of our own Code of Practice, "that an indictment shall be deemed sufficient, if it state the act constituting the offense in ordinary and concise language, and in such a manner as to enable a person of common understanding to know what is intended, and with such degree of certainty as to enable the court to pronounce judgment on conviction, according to the right of

the case," we readily conclude that the indictment quoted is a good indictment for robbery. True, it does not say in so many words that the property was *taken from the person of McNeal*, but it certainly says that it was taken from McNeal, after saying that he was in the possession of it at the time it was taken, and that it was taken from him by force, by pointing pistols and other weapons at him, and by putting him in fear. With these statements in the indictment, all to be taken as true on demurrer, we not only think it certain, to a common intent, to a person of common understanding that the money was taken from the person of McNeal, but that it is impossible to draw from the language used any other conclusion than that it was so taken. We think it sufficiently clear to enable the court to pronounce judgment on conviction, according to the right of the case.

In this opinion we do not intend to indicate or sanction any change in the essential elements of the law of robbery, as that the property must be taken from the person of another, or in his presence, for such, accompanied by the assault, we regard as the distinguishing elements of the crime of robbery from larceny, but only to affirm that this is sufficiently charged in the indictment in this case.

Quite a number of exceptions were taken by counsel for defense during the progress of the trial, twenty-five separate bills being filed, besides numerous others only noted in the record, many of them referring to the action and ruling of the court on questions that we think are purely within the sound discretion of every trial judge in a criminal cause, questions that do not admit of, and can not be controlled by, specific rules laid down in advance.

Some of these exceptions refer to the rulings of the court on questions of evidence, and the extent to which the court

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should have indulged counsel for the defense, in showing the active part two certain detectives took in the case, and the control and influence they exercised over Frank P. Brown, one of the parties indicted, but against whom the indictment having been dismissed he was introduced by the State. His testimony showed that he was an accomplice, and as such the jury were carefully instructed as to the insufficiency of his testimony to convict the accused unless corroborated by other evidence as designated in our Criminal Code of Practice. And the court did indulge counsel at great length, and properly so, to show this control and influence of these detectives over Brown. And so the matter being a legitimate subject of evidence, and of criticism as affecting the weight to be given Brown's testimony by the jury, was fully and fairly before the jury, and we think the court did not abuse a sound discretion in refusing greater latitude.

Again, counsel for appellant complains that the Commonwealth was permitted to show that at the previous court Brown offered to plead guilty to the charge against him. This testimony, however, was only offered by the Commonwealth after other testimony, and after a long cross-examination by the defense, indicating that the good faith of Brown in his confession of guilt of himself, and the implication of Breckinridge, had been and was questioned. In this view we think his offer to plead guilty was competent.

Other exceptions by defendant go to the refusal of the court to hear other and further testimony to the effect that McNeal and possibly some other of the witnesses for the Commonwealth had said, soon after the robbery and before the arrest of either of the parties afterwards indicted. that the parties who committed the robbery were thor-

oughly masked at the time, and that they did not recognize them. As to such questions in laying the foundation for supposed contradiction, the witnesses said that they did not remember making the particular statements at the time and place laid, and to the persons named, but that such were the facts, and that they had often said after said robbery that the robbers were heavily masked and that they did not recognize them. All this it will be observed was before the arrest of either of the defendants, and at most would have been but the expression of an opinion as to whether after or when they saw these same parties again they would be able to identify them.

The testimony offered involved no contradiction of the evidence of the witnesses given on the stand.

Other exceptions were taken to the speeches by the Commonwealth's attorney and his assistant, in commenting on the law and testimony in the case, and in urging the jury by considerations of public policy to the enforcement of the criminal law, and to the conviction of the accused.

On this line we deem it sufficient to say that the arguments seem to us to be within the line of duty of a public prosecutor, and that if all the exceptions taken to the speeches had been sustained, we can not conceive much that would have been left for the attorneys for the State to have said.

We have thus spoken of those exceptions in a general way, time and space not permitting a minute notice and separate description of each.

We think the instructions given embrace substantially the law of the case, and without prejudice to the substantial rights of the accused. We do not deem it necessary to comment on the testimony further than to say, that if believed by the jury, it was sufficient to authorize the conviction,

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and that of its credibility and value the jurors are the sole and exclusive judges.

Certain it is, that a most earnest, vigorous and able defense was made by counsel for his client, notwithstanding which the jurors under oath, found to the exclusion of all reasonable doubt that the accused was guilty, and this finding was approved by the trial judge.

We do not find such error in the record as to authorize us to set aside the finding of the jury and judgment of the court.

Wherefore the judgment is affirmed.

CASE 44—PETITION EQUITY—APRIL 16.

Blankenbaker v. Woodruff, &c.

APPEAL FROM JEFFERSON CIRCUIT COURT, COMMON PLEAS DIVISION.

1. CONSTRUCTION OF DEVISE.—Under a devise by a testator to his widow for life, remainder to his daughters "for their benefit and the benefit of the heirs of their natural bodies up to the age of thirty years on the part of each of said heirs of their natural bodies," the daughters did not take merely a life estate, remainder to their children, but each took a fee simple estate, to be joint with her children, if she had any, otherwise to be absolute, and the limitation as to age, as explained by a codicil, was intended merely to postpone the right of control and alienation upon the part of the children of the daughters until they should reach the age of thirty years, thus continuing the disability of infancy until then.
2. LIFE ESTATE.—Under a devise by the testator to his wife of one-third of the "net proceeds" of a tract of land, she took merely one-third of the net profits for life and had no interest which she could devise.

JNO. W. BARR, JR., AND ALEX. G. BARRET FOR APPELLANT.

1. A devise to "my three daughters . . . for their benefit and the benefit

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- of the heirs of their natural bodies" gives the daughters a fee simple estate. (*Johnson v. Johnson*, 2 Met., 331; *McMeekin v. Smith*, 14 Ky. L. R., 732; *McCauley v. Buckner*, 87 Ky., 191), which is not cut down by the addition of the words "up to the age of thirty years on the part of each of said heirs of their natural bodies" as those words are explained by the testator.
2. This construction creates a vested instead of a contingent estate, and is, therefore, to be favored. (*Williamson v. Williamson*, 18 B. M., 375; *Williams v. Williams*, 13 Ky. L. R., p. 296; *Wedekind v. Hallenberg*, 88 Ky., p. 118.)
 3. No construction could be adopted which would give effect to the testator's desire to postpone the time at which his daughters' heirs could get control of the estate. (*Gen. Stats.*, chap. 63, art. 1, sec. 27; *Ludwig v. Combs*, 1, Met., 128; *Gray on Perpetuities*, sec. 214.)
 4. The testator's wife was entitled to the equitable fee simple in one-third of the seventy-two acre farm. (*Robbins v. Robbins*, 10 Ky. L. R., 209.)

JUDGE LEWIS DELIVERED THE OPINION OF THE COURT.

The question in this case is what estate appellant Fannie Blankenbaker takes under the will of her father, probated in 1871, and as follows:

"I, Abraham Blankenbaker, give and bequeath my estate and property, real and personal, that is to say: I give to my wife, Ann Blankenbaker, the use of my farm of one hundred and thirty-nine acres, my dwelling house and appurtenances, household and kitchen furniture, one horse and mule, and two cows; the farm to be leased, worked on shares or in such manner as may be agreeable to her; accurate accounts to be kept of expenditures and receipts and settlements to be made annually on the first day of January, my wife retaining one-third of the net proceeds, the other two-thirds to be equally divided between my daughters, Fannie, Mary Smith and Sarah Woodruff. At the death of my wife the above property thus given for her use shall be equally divided between my three daughters named above, for their benefit and the benefit of the heirs of their natural bodies

up to the age of thirty years on the part of each of said heirs of their natural bodies.

"To my daughter Ellen I give during her life nine thousand dollars in bonds of the city of Louisville, five thousand in Jefferson county bonds, and one thousand dollars for the purchase of an additional bond so as to make up the full amount of fifteen thousand dollars in bonds for the support, care and maintenance of my said daughter Ellen during her life. . . . I hereby appoint my daughter Fannie as the special trustee of the interest, care and comfort of my daughter Ellen. At the death of my daughter Ellen, the property thus set apart for her use shall be equally divided between my daughter Fannie and my two married daughters, Mary Smith and Sallie Woodruff, the division for my married daughters to be made on the terms already specified respecting their property; that is to say, for the use of themselves and the heirs of their natural bodies until said heirs shall reach the age of thirty years. The seventy-two acres of land lying east of my farm may be rented out, worked on the shares or sold, as a majority of the trustees of my will may determine to be best for the interest of my heirs. Whatever plan may be determined thus respecting the seventy-two acres, the proceeds shall be divided among my daughters Fannie, Mary Smith and Sallie Woodruff, on the same terms that I have already specified in reference to my property divided among them.

"My two houses on the east side of Fourth street . . . shall continue to be rented for the benefit of my wife, Ann, and my daughters Fannie, Mary and Sallie, one-third of net proceeds being paid over to my wife, the other two-thirds being divided equally between my daughter Fannie and my two married daughters Mary Smith and Sallie Woodruff, on the terms already specified; that is to say, for their benefit and

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the benefit of the heirs of their natural bodies up to the age of thirty years on the part of said heirs.

"I appoint my daughter Fannie, now residing on my farm, Robt. H. Snyder and nephew, William Blankenbaker, executors of my will."

To the will was added this codicil: "That there may be no misunderstanding of my meaning, I declare that by the expression in my aforesaid will touching the arriving at thirty years of age of my devisees and legatees, including therein the heirs of the natural bodies of my daughters, I mean that the estate devised and bequeathed to them shall not be subject to their control respectively until they reach the age named, that is to say, thirty years of age, it being the purpose of such provision to continue as to such estate the legal incapacity of infancy until the age of such heirs. This applies to everything devised to them under the will. Further, when I speak of so many thousand dollars in bonds, I mean so many bonds of \$1,000 each, without regard to the market value of said bonds.

"I find, in reading over the will, that in devising the net proceeds of the seventy-two acres of my land, I failed to provide that one-third of the net proceeds of that part of my estate shall be paid over to my wife. I hereby require that one-third of these net proceeds shall be paid over to my wife and that the other two-thirds of these net proceeds shall be paid over to my daughters Fannie, Mary Smith and Sallie Woodruff, on the terms respecting this, specified in my will of February, 1871."

We have copied substantially the entire will and codicil in order to fully understand, if possible, the testator's scheme for disposing of his property.

Both the married daughters, Mary Smith and Sallie Wood-

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ruff, have since died, each leaving a child and heir at law, and the controversy is between those children and their aunt, Fannie Blankenbaker, as to whether she is entitled, under her father's will, to a fee-simple or life estate in the two tracts of land, and also whether her mother, Ann Blankenbaker, who died testate, leaving her sole devisee, had more than a life estate in one-third of the tract of seventy-two acres.

The question arising in respect to the interest of each of the three daughters in the tract of one hundred and thirty-nine acres is as to meaning of the words: "At the death of my wife, Ann Blankenbaker, the above property thus given for her use shall be equally divided between my three daughters named above, for their benefit and the benefit of the heirs of their natural bodies up to the age of thirty years on the part of each of said heirs of their natural bodies."

If the language had been in substance: "I devise one-third of the land to each of my three daughters and her bodily heirs," that would have been an attempt to create an estate-tail which the statute converts into a fee-simple. But the words, "for their benefit and the benefit of the heirs of their natural bodies," serve to indicate intention of the testator to give to the heirs of the body of each daughter, if they were used in the sense of children, a joint estate with their mothers, not an interest in remainder. And that view is, to some extent, fortified by the codicil, which was made to explain the meaning of the words, "up to the age of thirty years on the part of each of said heirs of their natural body."

Neither the will nor the codicil shows an intention to postpone either the vesting in or use and enjoyment by the heirs of the bodies of the daughters of the estate devised; but simply to extend the incapacity of infancy ten years be-

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yond the statutory limit, during which period they were not to have the power to control, nor, inferentially, the power to alienate. It seems to us, therefore, the language used, does not, by any means, clearly show an intention to give to the daughters respectively a life estate, remainder to their respective bodily heirs.

But whether it was intended to give to such bodily heirs a joint interest with their mothers, taking effect immediately, or whether, if so, the statute forbidding suspension of the power of alienation for a longer period than during the continuance of a life or lives in being at creation of the estate, and twenty-one years and ten months thereafter, is thereby contravened, we are satisfied the testator never intended either of his daughters, particularly Fannie, to have any other or less than a fee-simple estate, which as to each was to be joint with her children, if she had any, otherwise to be absolute. Fannie was, at the date of the will, old enough, and, in opinion of the testator, had capacity enough, to be appointed by him trustee of his daughter Ellen, to whom was given personal estate of the value of \$15,000, and also to be appointed executrix of his will, though she was still unmarried, and evidently the testator believed she would continue so. As, therefore, it is evident the testator did not believe it probable she would have bodily heirs, he must have contemplated and intended she would have a fee-simple estate, otherwise he would have provided for her dying without children; for the will, though not either entirely plain or artificially drawn, shows he intended it to be precise and comprehensive. In our opinion, the daughter Fannie took under the will a fee-simple estate, to be absolute in case she had no children.

It seems to us clear, the widow, Ann Blankenbaker, was entitled to only an estate for life in the tract of seventy-two

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acres, and consequently, had no power to devise it, as she attempted to do, to her daughter Fannie. In fact, there is no language used in the will that shows an intention to give her any more than one-third of net profits of either tract for her life.

Wherefore, for the error in deciding Fannie Blankenbaker had only a life estate in the real property, the judgment is reversed and cause remanded for further proceedings consistent with this opinion.

CASE 45—AGREED CASE—APRIL 16.

Cooper, County Clerk, v. Shelton.

APPEAL FROM LINCOLN CIRCUIT COURT.

LOCAL OPTION—REPEAL OF STATUTE.—The exclusive power conferred by the charter of towns of the sixth class upon the trustees of such towns to regulate the sale of liquor therein, authorizes the trustees to license the sale of liquor only when the same can be done without violating existing law; and the provision of the charter conferring that power upon the trustees did not have the effect to repeal the general local option law as to such towns. Therefore, a vote subsequently taken under that law in a magisterial district embracing a town of the sixth class having resulted against the sale of liquor, the trustees of the town had no power while that law was in force to license the sale of liquor therein.

The trustees of a town of the sixth class having assumed to license plaintiff to keep a tavern with the privilege of retailing liquors, in this proceeding for a mandamus against the county clerk to compel him to issue to plaintiff a State license, the court holds that it was error to award the mandamus, the local option law having been voted into operation in the town on the 26th of March, 1894.

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J. B. PAXTON FOR APPELLANT.

1. Even if appellee was entitled to the license as a matter of right, the clerk properly refused to grant it, because he had no legal right to do so, that being the duty of the County Court. (Ky. Stats., secs. 3704, 4203, 1057; *Tabor v. Lander*, 15 Ky. Law Rep., 8; s. c. 94 Ky., 237.)
2. The appellee was not entitled to the license as a matter of right, because prior to the application the Stanford magisterial precinct, which embraced the town of Rowland, had adopted local option, under the act of August 6, 1892. The local option law was not repealed by the charter of cities of the sixth class.

The fact that two acts were passed at the same session of the Legislature is strong evidence that one is not intended as a repeal of the other, especially at a session adopting a whole system of laws (*Commonwealth v. Huntley*, 156 Mass., 236; s. c., 15 L. R. A., 839; *Lawson's Rights and Remedies*, secs. 3778 and 3779; *In re Hall*, 38 Kan., 670.)

3. Rowland being embraced within the Stanford magisterial precinct is bound by the vote adopting local option therein. (*Commonwealth v. King*, 86 Ky., 436.)
4. Even conceding that the charter gives the trustees exclusive control of licenses, this provision is not self executing, and is of no avail without an ordinance to put it in operation; and there being no ordinance on the subject the whisky traffic is without regulation, unless the general law prevails. (*Black on Intoxicating Liquors*, secs. 228; *State v. Andrews*, 11 Neb., 523.)
5. If the local option law was repealed by the subsequent enactment of the charter then, and for the same reason, so much of the charter as attempts to give to the Board of Trustees exclusive control of granting licenses to "all trades, occupations and professions" is repealed to the extent of excepting therefrom "tavern and liquor licenses" by the later act (June 10, 1893), defining the jurisdiction of the county court, and giving it power to grant the licenses named. (Ky. Stats., sec. 1057.)

It seems highly probable that the intention of the Legislature was to give to the county court, as it has always had, supervision and control of tavern licenses. (Ky. Stats., secs. 129, 4203, 4207, 4208, 4211.)

W. G. WELCH FOR APPELLEE.

1. The local option law as to the town of Rowland was repealed by the charter of towns of the sixth class. (*Tabor v. Lander, &c.*, 94 Ky., 237.)

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2. If the trustees of the town had the exclusive authority to grant this license, the county court has no jurisdiction in the matter, and it is the clerk's plain ministerial duty to accept for the State the license tax, and as a matter of right to issue the license. (Adams v. Stephens, 88 Ky., 444.)

JUDGE GUFFY DELIVERED THE OPINION OF THE COURT.

This appeal is prosecuted by Geo. B. Cooper, county clerk of Lincoln county, from a judgment of the Lincoln Circuit Court rendered in the case of Thos. S. Shelton against Geo. B. Cooper, clerk, etc.

The agreed facts in the case show that on the 26th of March, 1894, an election had been legally held in Stanford magisterial district as to whether spirituous, malt or vinous liquors should be sold, bartered, or loaned in said district, and that a majority of the votes cast at said election were cast against such sale, and that due return of same had been made to the proper office and the proper entry made on the county court order book. That after all this had been done the trustees of Rowland, a town of the sixth class, in said magisterial district, assumed to license the appellee to keep a tavern and sell by retail spirituous, malt and vinous liquors in said town of Rowland, and that appellee presented what purports to be such license to the appellant and offered to pay the State tax of \$150, and to execute bond and take the oath of a tavern-keeper, and demanded that the appellant issue to him State license. Appellant refused to issue any license or otherwise comply with appellee's demands. Appellee then instituted this action to procure a mandamus requiring appellant to issue the license, and upon final hearing the court adjudged that the writ issue, and from that judgment this appeal is prosecuted.

It is insisted by appellee that the act providing for the

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government of towns of the sixth class gives to the trustees of such towns exclusive power over the questions of license to retail liquor, and that it repealed all other laws, including the local option law, as to such towns, and cites the case of *Tabor v. Lander*, 94 Ky., 237, in support of his contention. But that case is wholly unlike the case at bar.

In that case it appears that by vote under the local option law, the sale of liquor had been prohibited in the Hawesville magisterial district, and that after such vote had been taken, the legislature, in 1888, had amended the charter of the town of Hawesville, and had given the town authorities power to license the sale of liquor. In 1890 another vote under the local option law was taken resulting in a majority vote against such sale. The act of 1888 was intended, and necessarily had the effect, to repeal the local option law then in force in Hawesville, and it being a local act and containing no provision for its repeal by any vote to be thereafter taken, it remained unaffected by any vote taken under the general law in force at the time of the passage of said act.

The local option law now in force, and which has been in force for many years, with, perhaps, slight amendments, is contained in chapter 81 of the General Statutes, and seems to have been re-enacted 10th of March, 1894. It provides for the taking of a vote as to the question of the sale, etc. of liquor in any county, civil district or town, and if a majority of those voting vote against such sale, then no license can be lawfully issued authorizing the sale in such district or civil division. Such a vote having been taken in the Stanford magisterial district, of which the town of Rowland is a part, and having resulted in a majority of votes against the sale of liquor, and the returns having been made and certificates entered as required by law, no author-

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ity could legally license the sale of spirituous liquors in said district. The exclusive authority given by the act providing for the government of towns of the sixth class to the trustees thereof only authorizes the trustees to license the sale of spirituous, malt or vinous liquors in such towns when the same can be done without violating existing law.

For the reasons given the judgment of the court below is reversed and cause remanded with directions to set aside the order awarding the mandamus, and to dismiss appellee's motion.

CASE 46—PETITION ORDINARY—APRIL 18.

City of Louisville v. Harlan.

APPEAL FROM JEFFERSON CIRCUIT COURT, COMMON PLEAS DIVISION.

RECOVERY OF MONEY PAID UNDER MISTAKE—ESTOPPEL.—Where a city paid to one who had contracted to keep the public pumps in repair a greater sum than he was entitled to receive, the excess being paid under a mistake as to the number of pumps, this mistake being due to a false report as to that matter made by the contractor, the city is entitled to recover back the excess thus paid, unless the contractor entered into the contract, fixing a low price per pump upon the faith of information furnished him by the authorized agent of the city that there was the number of pumps which he afterward reported; and in that event the city is estopped to recover back any part of the sums paid under the original contract. But as the contractor was required under that contract to make oath each month to the justness of his claim, which was based upon the number of pumps, it was his duty to find out the number of pumps, and he is conclusively presumed to have known when subsequent contracts were entered into how many pumps there were, and so could not then have been deceived by the information originally furnished by the city. Therefore, the estoppel does not apply as to sums paid under any other contract than the original one.

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H. S. BARKER FOR APPELLANT.

Appellee could not have discharged his duty to the public as contractor without having known the number of pumps and, therefore, the city was not estopped by the misrepresentation made by its agent. (Bigelow on Estoppel, chap. 18, sec. 4, pp. 626-7; Herman on Estoppel, vol. 2, sec. 791, p. 919.)

T. L. BURNETT AND F. HAGAN FOR APPELLEE.

1. The city is bound by its own acts, and as it represented to appellee it had 1,040 pumps to repair and paid him for that number, it can not now claim a mistake. (Pickard v. Sears, 6 Ad. & El., 469; 2 Exch., 654; 2 Herman on Estoppel, 883, 889; Swan v. Australian Co., 7 H. & N., 603; 81 N. Y., 57; 37 Am. Rep., 475; 49 Iowa, 270; 94 Ill., 191.)

Estoppels apply to corporations as well as individuals. (2 Herman on Estoppel, 1367, 1368, 1369, 1386; 12 Wheat., 70; 21 Wis., 217; 139 Ill., 306.)

2. The court instructed the jury that Harlan could recover only what the work was *reasonably* worth. Surely of this the city can not complain.

JUDGE LEWIS DELIVERED THE OPINION OF THE COURT.

Samuel H. Harlan and city of Louisville entered into three several contracts, each for one year, that expired September, 1, 1889, 1890 and 1891, whereby he agreed to clean the public wells and keep in repair all the public pumps in the city, furnishing material according to specifications on file in the health office at the price of thirty-five cents per month for each pump during first, seventy cents per month for each during second, and sixty-five cents per month for each during third contract period, and afterward received full payment at the prices fixed for 1,040 such pumps kept in repair under first, for 1,000 under second, and for 1,000 under the third contract.

But it having been subsequently ascertained by officers of the city upon actual count, and now conceded, that the true number of pumps was and is only 522, this action was

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brought to recover back from him the sum of difference between what he was entitled to at the fixed prices per pump for that number and what he had received, upon the ground such excess had been paid by the city through mistake and without consideration.

The defense is placed upon the ground that although at the dates of the contracts, the health department had control and supervision of the wells and pumps of the city, that duty had previously been imposed upon and performed by the engineering department, which officially reported to the city council for the year 1888 the number of pumps to be 1,040; and that defendant being referred by officers of the city to that report for information on the subject, and caused thereby to believe such was the actual number, made his bids and entered into the several contracts to keep the pumps in repair at the prices mentioned.

But the number of pumps was not specified, it being stipulated in each contract, generally, that defendant was to keep all in the city in repair at a fixed price per pump. And if, as is placed beyond doubt, defendant received through mistake of plaintiff, payment at prices agreed on for repairing 1,040 pumps under the first contract and 1,000 under the second and third contracts, when there was in fact only 522 that he did keep in repair, then *ex aequo et bono* he should be required to pay back the excess, unless, as is contended, city of Louisville is estopped by conduct of its authorized officers.

The evidence shows there was an inspector of pumps whose duty it was to ascertain and report regularly to the health office what particular pump or pumps needed repair, and defendant acted on that information. And at the end of each month a voucher was made out in his favor by a clerk of the health office for amount found due by multiply-

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ing the number 1,040 under first contract, and 1,000 under second and third contracts, by the price fixed for each period, without regard to either the actual number repaired, or the actual number in existence. But before receiving payment, he, as required by law, made oath to justice and correctness of each voucher.

The court below instructed the jury to find for plaintiff, unless they believed from the evidence "that before the defendant made the contracts with city of Louisville sued on, . . . he was informed by its officers who had charge of the department which superintended repairs made upon the public wells and pumps of the city, or by his assistant or secretary, that there were 1,040 public wells and pumps in the city, and he believed the information so received to be true and relied upon it when he made the said contracts."

Although report of the engineer made in 1886 was so grossly incorrect as to evidence inexcusable negligence, still if defendant believed, and in good faith entered into the contracts believing, the report was true, not being himself in fault, then his plea of estoppel would avail. But in due performance of his contract he had means of knowing, and could not honestly make oath to justice and correctness of his monthly demands without knowing, the precise number of pumps he had undertaken to keep in repair. Therefore, in legal contemplation, he did know, and was not deceived or misled when he entered into the second and third contracts, if at all, and clearly plaintiff is entitled to recover back the excess paid under them, and the court erred in not so peremptorily instructing the jury.

It may be that defendant entered into the first contract agreeing to keep the pumps in repair at the comparatively low price of thirty-five cents per pump in good faith believing report of the engineer was true, and the instruction given

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would not be improper on a new trial, if made to relate only to that contract. For it was not his legal duty to know and he may have in good faith believed that report was true and relied upon it.

For the error indicated the judgment is reversed for new trial consistent with this opinion.

CASE 47—PETITION EQUITY—APRIL 18.

Clark, &c v. Layne, &c.

APPEAL FROM FLOYD CIRCUIT COURT.

GUARDIAN AND WARD—CONTRACT FOR SALE OF TREES—FRAUD.—A writing executed by a guardian agreeing to sell to another the dead and perishing timber on his wards' land passed no title until the timber was so marked that it could be readily identified. And as a large number of the most valuable trees on the land had been deadened just before the writing was executed, and this fact was known to the purchaser, but not known to the guardian, and the guardian upon discovering the fact refused to let the purchaser have these trees, and under the advice of counsel began to prepare them for market in order to save as much as possible for his wards, and had expended several hundred dollars in doing so, when he was removed as guardian and the person who had caused the trees to be deadened was appointed in his stead, having fraudulently conspired with the purchaser for that purpose, in this action by the former guardian alleging these facts, and the further fact that the purchaser under the writing referred to has taken possession of the timber and intends to account for it only at the prices named in the writing, which is much less than it is worth, plaintiff is entitled to reasonable compensation for the labor and expense which he in apparent good faith incurred in preparing the timber for market, and the court should by proper orders protect the rights of the infants, as it would be a fraud upon their rights to enforce the writing against them, even if it was a contract. And, although the infants filed a written request that the court dismiss the action as to them, it was error to do so.

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JAMES GOBLE FOR APPELLANTS.

The petition states a cause of action, and it was error to dismiss it over the protest of the next friend. (*Hopkins v. Virgin*, 11 Bush, 677; Civil Code, sec. 35; Gen. Stats., chap. 48, art. 1, sec. 10.)

R. S. FRIEND AND WM. H. HOLT FOR APPELLEES.

1. This appeal can not be sustained, because only as to Wm. Akers as an individual was an appeal granted, and the judgment did not dispose of the case as to him.
2. By the common law an infant could sue by his guardian or next friend. The guardian was the one unless for some special reason. If he refused, and the suit was necessary, and for the benefit of the infant, then by order of court he could sue by a next friend. (*Tyler on Infancy and Coverture*, sec. 133.)
3. Considering the ages of the infants a next friend should not be allowed to compel them to sue contrary to their wishes. (*Anderson v. Anderson*, 11 Bush, 327.)

JUDGE GUFFY DELIVERED THE OPINION OF THE COURT.

This was an action instituted in the Floyd Circuit Court by Wm. Akers in his own name and as next friend to Judd and Alice Clark, against Henry Hall, James P. Layne and F. N. Morell. The petition alleges in substance that appellant Akers had lately been the guardian of said Clarks, and that while so acting as guardian appellee Hall or Layne had sought to purchase of him the dead and perishing timber on certain lands, the property of said infants, and that after consulting a lawyer, he, appellant, agreed to sell said timber and entered into the following written contract, viz.:

August 30, 1892.

I hereby agree to sell J. P. Layne all down and dead and perishing timber on the John Clark heirs' land that I, as guardian, have control of on the Frog branch and Lackey place for \$1.00 per tree or log, and those that will make one log, fifty cents per log. Said Layne is to pay said money

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or to give note and security for said timber before it is moved off the place.

Signed, WM. AKERS,

Guardian for John Clark's heirs.

J. P. LAYNE.

Appellant further alleged that just before the said writing was executed, appellee, Hall, had deadened or caused to be deadened about 145 of the most valuable trees on his ward's lands, which fact was known to appellee Layne, but unknown to appellant, and that at that time, after the execution of said writing, appellee Hall deadened or caused to be deadened on said land, another lot of about 100 trees, making in all 245 trees, poplar and oak; that he learned of this deadening a few days after the execution of the writing and refused to allow Layne to take said 245 trees, but that Layne contended that under the writing he was entitled to said trees as well as to the other dead and perishing timber; that he offered to go with Layne and mark such of the dead and perishing timber as he really had agreed to sell, which Layne refused to do unless he could get the other trees. Appellant then consulted his attorney, and, acting under his advice, proceeded to commence preparing said trees for market, so as to save as much as possible for his wards, and after he had expended several hundred dollars' worth of time and means in said preparation, appellees Hall and Layne fraudulently conspired together and procured an order of the county court removing appellant from the guardianship of said wards, and the appointment of said Hall as guardian, appellees Layne and Morell becoming his sureties, and that after this, Layne claiming under said writing, took possession of said timber and has or will convert the same to his own use, intending to only pay according to prices named in said writing.

The petition also alleges that the said 245 trees were, if

delivered as appellant was intending and preparing to deliver them, worth more than one thousand dollars, and that appellant had expended several hundred dollars in preparing same for market. Also that it was the intention of appellees for Layne to only account for the timber at the prices named in the said writing, and make appellant, as former guardian, account for the actual value of the timber. After answer had been filed, denying many, if not all, of the material allegations of the petition, but not agreeing to account for a fair price for the timber, appellees Hall and Layne filed a request in writing from the infants that the suit be dismissed so far as they were concerned, and moved the court to dismiss in accordance with the request, which motion was sustained and the action dismissed so far as the infants were concerned, and from that judgment this appeal is prosecuted. If the statements of the petitions are true it is manifest that these infants are in great danger of being wronged by some one, and now, while the facts can be shown, is the proper time to investigate and settle the matter. Between one and two thousand dollars' worth of the property of said wards ought not to be wasted or lost.

The writing in question was but an agreement to sell, and passed no title to Layne until the timber was so marked that it could be readily identified. This case illustrates the necessity and importance of the rule stated, for in this case the parties promptly disagreed as to what trees were included in the writing or contract, and besides this the writing, even if it was a contract, ought not to be enforced against the infants. It would be a fraud upon their rights to do so whether appellant intended to sell the 245 trees or not.

For the errors indicated the judgment of the court below

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is reversed and cause remanded with directions to set aside the order dismissing the action as to the infants, and to ascertain the value of the timber in controversy, and to allow appellant reasonable compensation for the labor and expense, if any, which he, in apparent good faith, incurred in preparing the timber for market, and by proper orders and judgment protect and guard the rights of the infants, and for further proceedings consistent with this opinion.

CASE 48—PETITION EQUITY—APRIL 19.

Bowers, Assignee, &c v. The Huntington
Bank.

APPEAL FROM HICKMAN COURT OF COMMON PLEAS.

1. PREFERENCE OF CREDITORS.—A particular transfer by an insolvent debtor will not be declared to operate as an assignment under the statute, unless it is specifically set out in a petition, filed for that purpose, and be charged to have been made in contemplation of insolvency, and with a view to prefer one or more creditors to the exclusion of others. A general allegation, after specifying certain transfers, that the debtor has made "sundry other assignments and transfers to other persons unknown to plaintiffs, all in contemplation of insolvency and within six months," and calling on the debtor to disclose any and all such transfers, does not authorize the court to declare any transfer not specifically mentioned to operate as an assignment under the statute.
2. SAME.—It is indispensable under the statute that the vendee, assignee or party receiving the benefit should be made a party to the petition and to the allegations attacking the particular transfer.
3. SAME.—It must appear from the petition that it was filed within six months after the transfer complained of, either by a direct allegation to that effect, or by stating the time the transfer was recorded or sale made and property delivered, so that by reference to that statement and the time the petition was filed it shall appear to have been within the time limited.

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4. **SAME.**—After the act of insolvency has been once established, then by operation of law all subsequent assignments and conveyances are subject to control by the courts with a view of finally distributing the estate of the debtor among all his creditors.

WHITE & GRIFFEY AND BISHOP & GREER FOR APPELLANTS.

1. No act of the debtor not specifically attacked by the petition can be declared to operate as an assignment under the statute. (*Wintersmith & Young v. Pointer & Conway*, 2 Met., 460; *Fuqua v. Ferrell*, 80 Ky., 69.)
2. To render an act of the debtor a violation of the act of 1856, it must appear that it was done not only in contemplation of insolvency, but also with the design to prefer creditors. (*Thompson v. Heffner's Ex'ors*, 11 Bush, 360; *Millett v. Pottinger*, 4 Met., 213; *Whitehead v. Woodruff*, 11 Bush, 209; *Savings Bank of Louisville v. McAllister's Adm'r*, 83 Ky.; *Hampton v. Morris*, 2 Met., 237; *Grimes v. Grimes*, 9 Ky. L. Rep., 694; *Talbott's Ass'ee v. Ewalt*, *Idem*, 908; *Levis & Broxhohn v. Zinn &c.*, 93 Ky., 628.)

W. G. BULLITT FOR APPELLEES.

1. Although the statute must be invoked by a creditor to give it operation, yet whenever it is properly invoked it relates back to the transaction of bankruptcy provided against by it, and takes hold of the whole of the property and assets as of that date, and operates as an assignment of all for the benefit of all creditors alike.
2. When the facts of a controversy are within the knowledge of the defendants and unknown to the plaintiffs, the answer will cure the defects of the bill or petition in equity. (*Neilson v. Churchill*, 5 Dana, 338; *Wall, &c. v. Hill*, 7 Dana, 173; *Bentley v. Bustard*, 16 B. Mon., 674.)

And answer will cure defects of petition at law, although the facts may be known to plaintiff. (*Drake's Ex'ors v. Semonin & Dixon*, 82 Ky., 291.)

N. P. MOSS ON SAME SIDE.

1. The evidence is sufficient to show that the transfers attacked by the petition were made in contemplation of insolvency. (*Thompson, &c., v. Heffner's Ex'ors, &c.*, 11 Bush, 359.)
2. The act of 1856 is a remedial statute and should be liberally construed. (*Gen. Stats.*, chap. 21, sec. 16.)

Bowers, Assignee, &c v. The Huntington Bank, &c.

JUDGE GRACE DELIVERED THE OPINION OF THE COURT.

This is an appeal by the Fulton Bank and sundry other parties, defendants in the court below, wherein a judgment was rendered in favor of the Huntington Bank and the First National Bank of Mayfield, setting aside divers and sundry conveyances, assignments and transfers, made by J. E. Bowers, Bowers & Boone, and by C. T. Bowers, to appellants and others, on the ground that they were severally made in contemplation of insolvency, and with a view to prefer certain creditors named in the petition. The judgment recites specifically the several transactions that it adjudges so made, and with the exception hereinafter named we think the judgment correct.

It is manifest from the great weight of the testimony in the cause, that these parties at the date of the transfers and assignment brought in question and adjudged to be within the prohibition of the act of 1856, were largely indebted far beyond any reasonable probability of paying, and that certain of their large creditors were apprehensive of losing their debts.

Manifestly recognizing the inability of the defendants to make payment in full, and that they, mostly being on the ground and near by, were constantly urging that some arrangements be made whereby their several debts could be paid. In fact, the chief officers of the Clinton Bank participated in the transaction whereby a sale of the dry-goods establishment, belonging to Bowers and Boone, was made, amounting to some thirteen thousand dollars, wherein and whereby some \$4,200 of debts due that bank for which they were liable as endorsers was paid. This was in December, 1889. And not long after this the Fulton Bank obtained a conveyance of a thousand-acre tract of land in Wolfe county,

to secure among other indebtedness some \$2,200 due them. Divers other transactions of a similar character occurred near by the time indicated, all evidencing the alarm and uneasiness of the several creditors so secured, and all made under such circumstances as clearly brought the several transactions within both the spirit and the letter of the act of 1856, under which plaintiffs filed their suit.

It may be observed that in none of these assignments or transfers was any provision made looking to the payment or security of either of the plaintiffs, who, together, were creditors in the sum of nine thousand dollars.

The isolated matter to which we refer in the judgment as being one that is now seriously questioned is that wherein by the judgment of the court appealed from, it adjudges that the conveyance made by C. T. Bowers of date December 24, 1889, to Reid and Ringo, was made in contemplation of insolvency. And thus the court makes this the transaction and the sale of same whereon it declares all the property of C. T. Bowers to pass under the act of 1856 to his creditors. The conveyance referred to as shown by the evidence was of a house and lot at the price of \$500, and which C. P. Bowers says in his evidence was conveyed by him to said parties Reid and Ringo, and to pay a pressing outstanding debt of his to said Ringo and Reid.

As to this judgment of the court appellants Ringo and Reid complain, and say that plaintiffs, in their petition, filed under the act of 1856, did not set up or attack the sale of this lot by C. T. Bowers to them at all, and this is true; while another transaction that C. T. Bowers had with the Fulton Bank on the 18th day of March, 1890, is attacked as being an act of insolvency. And this, too, is sustained by the court, yet it nowhere appears that plaintiffs ever set out either in their original or in any amended petition the

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sale of the house and lot by C. T. Bowers to Ringo and Reid, of date December 24, 1889, as being made in contemplation of insolvency, and to secure said parties to the exclusion of their other creditors.

In our opinion, such an allegation is indispensable under the statute. It may be noted that no transaction can be made to assign and transfer the property of a debtor to and for the benefit of his creditors, unless suit is filed based on that transaction, setting up the proper allegations under the statute, and filed, too, within six months of the making of the transfer or assignment. The thing done and relied upon must be set out and charged to have been done in contemplation of insolvency, and with a view to prefer one or more creditors to the exclusion of his (the debtor's) other creditors, as well as the suit must be filed within the six months.

It is indispensable under the statute that the vendee, assignee or party receiving the benefit must be made a party to this petition and to these allegations, that he may respond to same and make defense if he chooses so to do. His property secured by regular deed of conveyance, as in this case, can not be taken from him without suit and notice. The allegation must precede the proof. Without appropriate allegation no amount of evidence can be sufficient to deprive a creditor of his deed under the statute.

True after the act of insolvency has been once established, then by operation of law all subsequent assignments and conveyances are subject to control by the courts with a view of finally distributing the estate of the debtor among all his creditors. But in this case no previous act of insolvency is charged, or shown to have been committed by C. T. Bowers, and hence this conveyance is not affected under that clause of the statute.

While it is true that in this case the said Ringo and Reid were made defendants, yet it was to answer an allegation in the petition that the other brother, J. E. Bowers, had assigned to them certain other property mentioned, and that allegation was answered.

We do not find the deed from C. T. Bowers to Ringo and Reid in the record, nor the date of the transaction. Doubtless, however, the court correctly identifies the same as being within six months before petition filed, but the legal objection remains that that transaction had not been attacked by any creditor.

In the case of Wintersmith & Young, v. Pointer & Conway, 2 Met., 460, this court said: "A creditor who claims the benefit of this act (of 1856) must file his petition alleging the facts on which he bases his claim, within the time prescribed by the act itself. His right to treat the sale or transfer as an equitable assignment for the benefit of creditors generally, depends on the filing of a petition by himself or by some other interested person, within the time mentioned. This fact being essential to the existence of the right, must be made to appear, either by a direct allegation on the subject in the petition, or by stating therein the time the transfer was recorded, or sale made and property delivered, so that by reference to that statement, and the time the petition was filed, it shall appear to have been within the time limited."

See also Heidrich & Co. v. Silva, 89 Ky., 426; Vinson, &c., v. McAlpin & Co., 87 Ky., 357.

It is true that plaintiffs charge in their petition that the defendants, J. E. Bowers and C. T. Bowers, had made sundry other assignments and transfers to other persons, unknown to them, all in contemplation of insolvency and within six months next before the filing of their petition. And

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though they call on said Bowers Brother to answer and disclose any and all such transfers, yet there was made no specific charge of the particular transaction with Ringo and Reid, which called on them to answer, such as indicated by the court in its judgment. (H. B. Claffin Co. v. Levitch, 16 Ky. Law Rep. 866.)

Wherefore it is adjudged by the court that so much of the judgment only as declares the transfer by C. T. Bowers of the house and lot to Ringo and Reid of date, December 24, 1889, to be an act of insolvency on the part of said C. T. Bowers, and that it operated to transfer all property owned by him on that date to and for the use of his creditors generally, be and the same is reversed, set aside and held for naught.

In all other respects the judgment is approved, and this cause is remanded for further proceedings not inconsistent with this opinion.

CASE 49—PETITION EQUITY—APRIL 19.

Right Rev. George McCloskey, Roman Catholic Bishop v. Doherty, &c.

APPEAL FROM JEFFERSON CIRCUIT COURT, LAW AND EQUITY DIVISION.

1. WHEN THE NAME OF A CORPORATION IS CHANGED, either real or personal property held by it in its old name may be recovered by it in its new name without any transfer of title. Besides, as the defendant in this case contracted with the corporation in its new name, it is estopped to deny its title.
2. RIGHT TO ENJOIN TRESPASS.—For a mere trespass where the recovery in damages will fully compensate for the wrong, a court of equity will not interfere; but the rule is different where the

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trespasses are continual, and must result in a multiplicity of suits, and particularly where the wrong complained of is the assertion of a right not only hostile to the claim of the real owner, but that by its exercise will give the wrongdoer by the use and claim such a right as will deprive the real owner of title.

In this case, in which the defendant claiming under a lease for fifty years of a right of way for the construction of a railroad over plaintiff's land, has constructed his road over land upon which he had no right to enter under the lease, his acts not only constitute a continuing trespass, but the continued use of that part of the land upon which he has constructed his road will in time give him an easement of which he can not be deprived, and to prevent such a result the chancellor will interfere by injunction.

3. **TRESPASS TO LAND—PARTIES TO ACTION.**—Where the land is in the possession of tenants the right of action for a mere entry on the possession without any injury to the freehold is in them and not in the landlord. But where there is an injury to the freehold the rule is different, as by express provision of statute the owner of land may maintain an action to recover damages for any trespass committed thereon, or to prevent any trespass thereon, although he may not have the actual possession at the time of the trespass. (Ky. Stats., sec. 2361.)
4. **PURCHASER AT JUDICIAL SALE.**—The title to the right of way acquired by a purchase under a judgment of the chancellor gave to the purchaser no better title than the original lessees had.
5. **ESTOPPEL.**—The evidence fails to show any acquiescence on the part of the grantor amounting to an estoppel.

P. B. & UPTON W. MUIR FOR APPELLANT.

1. As appellees claim under appellant as tenants they are estopped to deny his title.
2. If they are not claiming under appellant, and are not estopped from denying his title, they are clearly trespassers without right or color of title, and in such case it is necessary only to prove fifteen years' possession on the part of appellant and those through whom he claims in order to secure the redress sought in this case. And whether such trespassers or not, adverse possession is enough. (15 Ky. Law Rep., 112; 1 Ky. Law Rep., 357; 13 Ky. Law Rep., 516; 10 Ky. Law Rep., 643, 661, 850, 851; 87 Ky., 426.)
3. The act of 1888 merely changes the corporate name of the Bishop, and it is not necessary for a corporation to convey to itself every time its name is changed. (16 Am. & Eng. Enc. of Law, p. 138;

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- Cahill v. Bigger, 8 B. Mon., 213; Coleman v. Morrison, 1 A. K. Mar., 406; McMillan v. Brown, 1 A. K. Mar., 153; Trustees of Hawesville v. Hawes' Heirs, 6 Bush, 236.)
4. The proof shows a clear case of adverse possession for twenty years.
5. Injunction is the proper remedy against a continuing trespass. (Hibbs &c. v. C. & S. W. R. Co., 39 Iowa, 343; 3 Pomeroy's Eq. Jur., sec. 1337; Carpenter v. Gwynne, 35 Barb., 395; Deveney v. Galligher, 20 N. J. Eq., 33; Wood on Nuisances, sec. 817 and authorities cited in note 4; Murphy v. Lincoln and others, 63 Vt., 280; 10 Am. & Eng. Enc. of Law, pp. 877, 881; Story's Eq. Jur., sec. 928; High on Injunctions, secs. 697, 700, 702; O'Hara v. Johnson, 7 Ky. Law Rep., 296; Chiles, Thompson & Co. v. Ringo, &c., 14 Ky. Law Rep., 302; Ellis v. Wren, 84 Ky., 254; Musselman v. Marquis, 1 Bush, 465; Preston v. Preston, 85 Ky., 16; Shock v. City of Falls City, 31 Neb., 599; Ashurst v. McKenzie, 92 Ala., 484.)

Injunction is also proper remedy where a trespass by being continued will ripen into an easement. (High on Injunctions, sec. 702; Poiner v. Fetter, 20 Kan., 47; Murphy v. Lincoln, 63 Vt.; Johnson v. Rochester, 13 Hun., 285.)

Injunction is proper in this case because the freehold itself is injured and vitally interfered with. (Rohmelsner v. Bannon, 11 Ky. Law Rep., 987; Peake v. Hayden, 3 Bush, 126; Bonaparte v. Camden & H. R. Co., Baldwin, 231.)

The right to injunction is given by statute. (Ky. Stats., sec. 2361.)

6. There is no element of estoppel in the facts alleged by appellees in their answer. (Bigelow on Estoppel. 437.)

MATT O'DOHERTY FOR APPELLEES.

1. Plaintiff is estopped to claim the relief which he seeks. (Herman on Estoppel & Res Judicata, secs. 938, 939, 940.)
2. To warrant the interference of a court of equity in restraint of trespass, the plaintiff must show that he has a perfect title. (High on Injunctions, secs. 701, 705, 726.)
3. It can not be urged that defendants are estopped to deny plaintiff's title to land, which they do not, according to plaintiff's own contention, hold from him either as tenants or vendees, or otherwise than forcibly and wrongfully.
4. Plaintiff has failed to show title to the land in dispute.

The object of the act of April 18, 1888, was to create a new corporation and to vest in that corporation the title to such prop-

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erty as the Rt. Rev. Wm. Geo. McCloskey owned as Roman Catholic Bishop of Louisville. But this the Legislature had no power to do. (Const. of Ky., sec. 11; Dartmouth College v. Woodward, 4 Wheat., 508; Cooley's Const. Limit., 6 ed., p. 288.)

There is no evidence to identify the land in controversy as any part of that embraced by any deed or will in evidence; nor is there in any deed or will offered any description of property corresponding to that of the land in dispute or embracing it.

5. Injunction is not the remedy. (Civil Code, sec. 84, sub-sec 2; Burr v. Woodson & Co., 1 Bush, 602; High on Injunctions, secs. 324, 360, 699; Pfeltz v. Pfeltz, 14 Md., 376; Wangelin v. Goe, 50 Ill., 459; Stevens v. Beekam, 1 Johns. Ch'y, 318; Jerome v. Ross, 7 Johns. Ch'y, 315; Hillman v. Hurley, 6 Ky. Law Rep., 683; Van Wert v. Webster, 31 Ohio St., 421.)
6. The land in controversy has been continuously rented out to tenants for the last twenty years. Therefore, the tenant and not the landlord must maintain the action for trespass. (1 Washburn on Real Property, p. 566; Pogue v. McKee, 3 Mar., 127; Hugden v. Temple, 12 B. M., 201; Walden v. Conn, 8 Ky. Law Rep., 282; Hillman v. Hurley, 6 Ky. Law Rep., 684.)

CHIEF JUSTICE PRYOR DELIVERED THE OPINION OF THE COURT.

In the month of September, of the year 1888, the Rt. Rev. William George McCloskey, Roman Catholic Bishop of Louisville, granted and conveyed to John G. Mattingly & Sons, of Louisville, a right of way over certain lands, for the period of fifty years, for the construction and operation of a railroad for the private use of the firm, to run from their place of business to and from the railroad. The lessees transferred the lease of this right of way to B. D. Mattingly and Charles Doherty. John G. Mattingly, etc. failed, and the right of way was sold under a judgment of the Louisville Chancery Court, and purchased by the appellee Doherty, or at least the appellee claims to have derived title under that purchase. The appellant was not a party to the action in which that right of way was sold, nor does it appear that he had any knowledge of what had been sold under the judgment. The lease describes the location of this road, and

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specifies the exact boundary of the right of way, and this controversy has originated from the failure of the appellee, or the lessees of the appellant, to construct its road on the right of way as agreed upon by the parties to the lease. It is conceded, or if not the testimony shows, the lessees paid no regard to the boundary specified in the lease, but made such a divergence from the main route or boundary defined as to sever a part of the appellant's land from the principal tract, and in such a manner as to render that part of it cut off valueless, and, as appellant claims, to the great injury of his possession.

This action was instituted to quiet the title of the appellant, in which it is alleged, the appellee is continuously using this right of way with his cars running over the appellant's land at a place not authorized by the lease, and an injunction sought to prevent this continued use of the premises, and to so reform the lease as to locate the road where the parties agreed it should be placed.

That part of the petition asking for a reformation of the lease was withdrawn, and the case was heard upon the issue, as to the proper location of the appellee's right of way under the lease, and his right to use it as constructed, upon the ground of acquiescence on the part of the grantor, and the right of the appellee to hold it by reason of the sale made under the order of the chancellor. It may be also said the appellee placed in issue the title of the appellant as well as the possession, and denied the commission of any trespass on his premises.

This land, as appears from the record, belongs to the diocese of which the appellant, Rt. Rev. William George McCloskey, is bishop, and has been held by him and the bishops preceding him for many years. Prior to April, 1888, the title was vested in the "Rt. Rev. William George McCloskey,

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Roman Catholic Bishop of Louisville, and his successors in office," at which time the style of this corporation was changed by an act of the legislature, to that of "Rt. Rev. William George McCloskey, Roman Catholic Bishop of Louisville," omitting the words, "and his successors in office," and it is now contended that as the name of the corporation was changed, it was necessary, in order to pass the title, that a conveyance should have been made from the one corporation to the other, as the legislature had no power to divest one of title in that mode. We think it manifest that a mere change in the corporate name is not a divestiture of title, or such a change as would require a regular transfer of title to property, whether real or personal, and the last named corporation being the same as the first, and held for like purposes and by the same person, such an objection is no obstacle to the recovery. Besides, it appears that the appellee, or his vendor, contracted with the Rt. Rev. William George McCloskey in his corporate name, and acquired the right of entry and possession under this title, and is estopped from denying the manner of his holding. This right of way was carved out of the tract of land then claimed and in the possession of this corporation, and the entry of the appellee was under this title.

It is true if the land on which the alleged wrongful entry was made was not in the possession of the appellant or his tenants, or belonged to another, the appellee could to that extent question the title, but there is no effort to show title in another, and the appellant by himself and tenants, and those under whom he claims, has shown an actual and continued possession with the claim of ownership for more than thirty years, with this land, of which the right of way forms a part, enclosed by a fence since the year 1862, and with this character of title it is needless to examine

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the evidences of paper title found in the record. In fact, the appellant shows an actual continued possession by himself and tenants for about eighteen years prior to the bringing of the action.

It is again contended that the appellant having an adequate remedy at law for this wrongful entry, a court of equity should not take jurisdiction to quiet the title by reason alone of the trespass upon the part of the appellee.

It is a well settled rule of law that for a mere trespass where the recovery in damages will fully compensate for the wrong a court of equity will not interfere, but equally as well settled, that where the trespasses are continual and must result in a multiplicity of suits, a court of equity will interfere, and, particularly, when the wrong complained of is the assertion of a right not only hostile to the claim of the real owner, but that by its exercise will give the wrongdoer, by the user and claim, such a right as will deprive him (the real owner) of title. (*Poirier v. Fetter*, 20 Kan., 47; *Musselman v. Marquis*, 1 Bush, 463; *Peak v. Hayden*, 3 Bush, 125.)

The acts of the appellee in this case not only constitute a continuing trespass, but the lease under which he claims gives him the possession under the grant for the period of fifty years, and the continued use of that part of the land upon which he had no right to enter would, in a much less period of time, give to the appellee an easement of which he could not be deprived, and to prevent such a result the chancellor will interfere by injunction. (*Murphy v. Lincoln*, 63 Vt., 278; 1 High on Injunctions, 702.)

It is again insisted that as the appellant's tenants were in the actual possession the action should be in their names. While for a mere entry on the premises without any injury to the freehold such would be the rule, the stat-

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ute provides "that the owner of land may maintain the appropriate action to recover damages for any trespass or injury committed thereon, or to prevent or restrain any trespass or other injury thereto or thereon, notwithstanding such owner may not have the actual possession at the time of the commission of the trespass." (Ky. Stats., section 2361.)

We find no element of estoppel in this case either by acquiescence on the part of the appellant or by any subsequent contract, but on the contrary the way or its boundary was so specifically defined as not to admit of any doubt as to the place for the construction of the railway, and the proof shows there was no excuse to so far depart from the location of this route as to leave it several hundred feet without the consent of the appellant.

There is no pretense that any consent was obtained to this change of location, or that the appellant, or his agent, Father Bouchet, knew of the construction of this way on a different route than that provided in the lease. Some testimony was introduced showing that Bouchet, the agent, had, at one time, taken a buggy ride in the vicinity of the road, but his testimony is that he never knew of this wrongful location of the road until about six months before the action was instituted, and that as soon as he discovered the wrongful appropriation of the land, he made known his objection, and much time seems to have been consumed by both parties in a fruitless effort to adjust the matter in dispute.

The title acquired by the purchase under the judgment of the chancellor gave to the appellee no better title than the lessees had, and while it may be a source of great inconvenience to the appellee to disturb him in his possession, the title to the land in dispute being in the appellant,

the appellee must surrender it, as neither the letter of the lease or a liberal construction of its terms will authorize the chancellor to adjudge that he can hold the possession against the consent of the real owner. It results therefore that his title should be quieted, and the appellee required to remove his track and locate it on the ground designated in the lease, or so construct it as to keep himself within the terms of the grant.

Judgment reversed and cause remanded for proceedings consistent with this opinion.

CASE—50—INDICTMENT—APRIL 20.

Sutton v. Commonwealth.

APPEAL FROM JEFFERSON CIRCUIT COURT, CRIMINAL
DIVISION

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107	161
97	308
117	89

97	308
123	20

1. INDICTMENT—VARIANCE.—Where an indictment for uttering a forged warehouse receipt charged that the forged writing certified that the whisky for which it was issued was in a certain bonded warehouse, in the "fifth" district of Kentucky, the fact that it appeared upon the trial that the warehouse described in the receipt was in fact in the eighth district of Kentucky did not amount to a variance between the indictment and proof.
2. WHERE AN EXAMINING COURT HAS HELD THE DEFENDANT TO ANSWER THE CHARGE before the grand jury, the failure of the first grand jury to indict should be treated as a direct refusal to indict, and a subsequent grand jury can not indict unless the charge is submitted to them by direction of the court. But if an indictment is subsequently found without the charge having been again submitted to the grand jury by direction of the court, the defendant waives the right to have it dismissed upon that ground, if he pleads to it without making a motion to dismiss.

In this case, the indictment having been found without direction of the court after two terms had intervened since the examining trial, the indictment was properly dismissed as to one

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of the defendants, who made his motion to dismiss before pleading to the indictment, but a motion made by the other defendant for the first time after there had been one trial, and a failure of the jury to agree, came too late, and was properly overruled.

3. A DISMISSAL AS TO ONE OF THE DEFENDANTS did not *ipso facto* operate as a dismissal as to the other.
4. FAILURE TO INDORSE NAMES OF WITNESSES ON INDICTMENT.—A motion to set aside the indictment upon the ground the names of the witnesses were not indorsed as required by sec. 120 of the Criminal Code, should have prevailed if it had been made in proper time, but, as it was not made until after defendant had pleaded and gone into one trial, it came too late.

D. W. SANDERS FOR APPELLANT.

There is a variance in the proof of tenor of the uttered forged instrument. The warehouse receipt set out in the indictment was issued by Searcy in the fifth Kentucky district, and the evidence of Mr. Searcy, the distiller, whose signature thereto is alleged to have been forged, says that his distillery and bonded warehouse are in the eighth district. This variance is fatal. (Clark v. Commonwealth, 16 B. Mon., 213; Brown v. People, 66 Ill., 344; Roberts v. State, 2 Texas App., 4; 1 Bishop's Crim. Proc., sec. 562; United States v. Keene, 1 McLean, 441; State v. Noble, 15 Me., 476; Porter v. State, 15 Ind., 433; Archbold's Crim. Pr. & Pl., vol. 1, 282.)

Cited in petition for rehearing: Commonwealth v. Harrison MS. Op., May 15, 1895; Hensley v. Commonwealth, 1 Bush, 11; McBride v. Commonwealth, 13 Bush, 337; Hart v. State of Ohio, 20 Ohio, 49; Queen v. Henry and Ward, 1 Cox's Crim. Cases, 101; Queen v. Jones, 1 Cox's Crim. Cases, 105; Queen v. Dent, 2 Cox's Crim. Cases, 354; Regina v. Roe, 11 Cox's Crim. Cases, 554; Regina v. Whitehouse, 5 Cox's Crim. Cases, 145; Bishop's Crim. Proc., vol. 1, secs. 486, 488, 562; vol. 2, secs. 415, 466, 3 ed.

CHARLES G. RICHIE ON SAME SIDE.

1. No severance being had, the quashal of the indictment as to one of the parties quashed it as to both. (Wharton's Am. Crim. Law, sec. 520; People v. Eckford, 7 Cow., 535; State v. Smith, 1 Murphy, 213; Starkie's Crim. Proc., sec. 17; 2 Hawkins, chap. 25.)
2. Even if this was not the effect, Sutton's motion to quash stood upon the same ground as did Beecher's, and if it was proper to quash as to one, it was proper to quash as to both.
3. The court should have sustained the motion to quash, upon the

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- ground that the names of the witnesses were not appended to the indictment. (Crim. Code, sec. 120; Commonwealth v. Minor, 11 Ky. Law Rep., 777; Andrews v. People, 117 Ill., 195; s. c., 7 Am. Cr. Rep., 249; McKinney v. People, 2 Gilman, 525; Ex parte Schmitt, 71 Cal., 212; State v. Rogy, 83 Mo., 268; State v. Griffin, 87 Miss., 608; 89 Miss., 49; People v. Hall, 28 Mich., 482; Hickory v. United States, 151 U. S., 307; Logan v. United States, 144 U. S., 304; United States v. Stewart, 2 Doll, 348; United States v. Curtis, 4 Mason, 232; United States v. Dow, Taney, 34; Regina v. Frost, 9 Car. & P., 129; Lord v. State, 18 N. H., 173; People v. Hall, 48 Mich., 482; Keener v. State, 18 Ga., 194.)
4. The motion to quash, being made before the final submission to the jury, was not too late. (Commonwealth v. Gow, 3 Dana, 475; Commonwealth v. Hutchinson, 1 Bibb, 365; Allen v. Commonwealth, 2 Bibb.)
 5. The indictment charged that the Searcy warehouse was in the fifth district, and the proof showed it to be in the eighth. This was a fatal variance.

WM. J. HENDRICK, ATTORNEY-GENERAL, FOR APPELLEE.

1. The authorities cited for appellant on the point of variance in allegation and proof apply in cases of indictment for forgery and not for uttering a forged instrument. (Lockard v. Commonwealth, 87 Ky., 201.)
2. On motion to set aside indictment for failure to place names of witnesses on back of indictment, see Commonwealth v. Smith, 10 Bush, 476; Haggard v. Commonwealth, 79 Ky., 366; Commonwealth v. Pritchett, 11 Bush, 277.

JUDGE LEWIS DELIVERED THE OPINION OF THE COURT.

September 23, 1893, A. R. Sutton and W. M. Beecher were jointly indicted for the crime of feloniously uttering and publishing as true a warehouse receipt known by them to be forged.

The writing, as described in the indictment, purports to have been signed by J. S. Searcy, certifying that A. R. Sutton & Co. had in the bonded warehouse of his distillery, No. 120, Fifth District of Kentucky, five barrels of whisky held for their account and subject to their order.

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Which warehouse receipt, as charged, was presented to and received by German Security Bank as collateral security for money advanced and loaned to A. R. Sutton.

September 26th, defendant Beecher moved to set aside the indictment as to himself upon the ground that, although he was held by an examining court to answer to the charge before the grand jury, April 18, 1893, there had been two terms of court at which grand juries were summoned and impaneled before an indictment was found against him, and there was no order of court submitting the charge to the grand jury that did find the pending indictment. And at the January term, 1894, of the court that motion was sustained and Beecher discharged from custody.

But defendant Sutton instead of then making the same motion in his own behalf, filed a general demurrer, which was overruled, and thereupon pleaded to the charge and was put upon trial at April term, 1894. The jury, however, failed to agree, and he was again tried at the May term, when a verdict of guilty was found fixing his punishment at confinement in the penitentiary for two years.

One of the grounds for a new trial, and now urged as reason for reversal of the judgment, to be followed by dismissal of the prosecution, is that there is a variance between the indictment and proof in this: That instead of the bonded warehouse of J. S. Searcy's distillery No. 120 being in the *Fifth* District as recited in the warehouse receipt copied in the indictment, it is, according to the evidence on the trial, in the *Eighth* district.

It seems to us that discrepancy is not equivalent to a variance, in proper meaning of that term, between allegation and proof. For it is not stated in the indictment the warehouse is in the Fifth District, but that the warehouse receipt charged to be a forgery purported to certify or re-

cite there was received and held for account of A. R. Sutton & Co., the whisky mentioned in the bonded warehouse of Searcy's distillery, No. 120, in that district. And there was no proof the receipt forged and uttered was other than the one charged in the indictment to have been so forged and uttered.

So, even if the discrepancy was material, which we do not believe it was under the Criminal Code, the only question there could arise would be whether obligatory character of the warehouse receipt was thereby lessened or affected; and that it would not be is plain.

The next error complained of is refusal of the court to sustain appellant's motion, not made until the case was called for second trial at the May term, 1894, to set aside the indictment for the same reasons it had been done as to Beecher upon his motion made in September, 1893.

Sec. 115 of the Criminal Code provides: "All the papers and other matters of evidence relating to the arrest of, and examination of the charge against, persons committed, or on bail, returned to court by magistrates, shall be laid before the grand jury, and if, upon investigation, they refuse to find an indictment they shall write upon some one of the papers 'dismissed,' with the signature of the foreman, and thereupon the court shall discharge the defendant from custody, if in jail, or exonerate the bail, if bail has been given, and order the return of any money which may have been deposited in lieu of bail to the person depositing it, unless the court be of opinion that the charge should be submitted to another grand jury, in which case the defendant may be continued in custody, or on bail, until the next term of court."

Sec. 116 provides: "The dismissal of the charge does not prevent it being again submitted to a grand jury, as often

as the court may direct, but without such direction it can not again be submitted."

It does not appear the grand jury at April term, 1893, first after trial of Sutton and Beecher by the examining court, formally refused after investigation to find an indictment against them, or that the foreman, as required in such case, wrote upon any one of the papers "Dismissed." But in our opinion a failure to do so should be treated as equivalent to direct refusal to indict. And as two terms of court had intervened before the indictment under which appellant was convicted had been found, and it was then done without direction of the court, the motion made by Beecher was required by sec. 158 sustained, being as follows: "The motion to set aside the indictment can only be made on the following grounds: 1. Substantial error in the summoning or formation of the grand jury. 2. That some person, other than the grand jurors, was present before the grand jury when they acted upon the indictment. 3. That the indictment *was not found and presented as required by the Code.*"

But sec. 157 expressly requires that "upon the arraignment, or upon the call of the indictment for trial, if there be no arraignment, the defendant must either *move to set aside the indictment* or plead thereto." And in the case of Commonwealth v. Smith, 10 Bush, 476, also, Commonwealth v. Pritchett, 11 Bush, 277, it was held impaneling as a grand juror one not a housekeeper, was "a substantial error in the formation of the grand jury" in meaning of the Code; but unless a defendant makes the motion to set aside at the proper time the right to make it is to be regarded waived. And applying the same rule to this case appellant Sutton must be held to have waived his right to set aside the indictment against him; for upon call of the indictment at Sep-

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tember term, 1893, instead of moving to set it aside on that ground he pleaded to it. It is, however, argued that as they were jointly indicted dismissal as to Beecher operated to dismiss the indictment, *ipso facto*, as to Sutton. But it seems to us that action of the court was equivalent to a severance of the trial which both defendants acquiesced in.

It is also contended the indictment ought to have been set aside, because sec. 120 was disregarded, being as follows: "When an indictment is found the names of all the witnesses must be written at the foot of or on the indictment." But while a motion to set aside upon that ground, if made in time, should prevail, it certainly ought not to be sustained after a defendant has pleaded, and gone into one trial without objection on that account, as did appellant.

We can not consider whether it was error to refuse a change of venue in absence of part of evidence heard on the motion.

We perceive no error of law to prejudice of appellant's rights, and judgment in this case is therefore affirmed.

CASE 51—PETITION—APRIL 20.

Commonwealth v. Blackwell.

APPEAL FROM UNION CIRCUIT COURT.

1. VACANCY IN OFFICE OF SHERIFF—APPOINTMENT OF TAX COLLECTOR.—Where a sheriff is removed from office upon motion of his sureties, and the office declared vacant, the county court has power to appoint a collector of a railroad tax for a particular taxing district in the county, the appointment being authorized both by the special act levying the tax and by sec. 4131 of the Kentucky Statutes. And for the purpose of collecting such taxes

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the collector has the powers a sheriff would have, and is under the same liability.

2. THE LAW AUTHORIZES THE APPOINTMENT OF A COLLECTOR FOR ANY TAXING DISTRICT as well as for the entire county, and it is not required that the collector shall be a resident of the district in which the taxes are to be collected, he not being a "district officer" within the meaning of sec. 234 of the Constitution.

WM. J. HENDRICK, ATTORNEY-GENERAL, FOR APPELLANT.

Does sec. 234 of the Constitution apply to a tax collector?

JUDGE GUFFY DELIVERED THE OPINION OF THE COURT.

This appeal is prosecuted from a judgment of the Union Circuit Court rendered in the case of the Commonwealth of Kentucky, etc., against T. C. Blackwell. The petition substantially alleges that by an act of the General Assembly of 1870, the magisterial districts of Caseyville and Lindle in said county were authorized to issue \$60,000 and \$15,000, respectively, in bonds to aid in building the Madisonville & Shawneetown Straight Line Railroad, which bonds were issued and were sold by said railroad company, and that it was also provided that sufficient taxes should be levied by the Union County Court to pay the said bonds, principal and interest, and that the sheriff of Union county should collect said taxes, but if he failed or refused to execute bond for thirty days after the levy of the taxes, the court levying the same might appoint a collector for the same, and that at the February term, 1894, of the county court of Union county the judge thereof levied a tax for the year 1893, on the property in the Caseyville precinct, of five dollars on each one hundred dollars of property therein, and on the property in the Lindle precinct two dollars and fifty cents on each one hundred dollars of property therein, and in said

order directed that the sheriff of the county should collect the same. That the sheriff at the April term of said court was, on motion of his sureties, removed from office, and the office declared vacant, and on the 22d day of May, 1894, the court entered an order appointing the defendant T. C. Blackwell collector for the collection of said taxes in said district, and he, on the 28th day of May, 1894, executed bond, took the oath of office, and qualified as collector and entered upon the duties of the office; that the office is of great importance and of vital interest to the residents of said district. That said Blackwell was at the time of his appointment, and still is, a resident of Uniontown magisterial district, and never was a resident of either of the said districts of Caseyville or Lindle. That he was not eligible to said office by reason of his residence, because of the provision of sec. 234 of the constitution, which requires that all district officers shall reside within their respective districts, and that the appointment was void and of no effect. The petition further avers that said Blackwell is a usurper of said office, and concludes with a prayer that he be restrained from exercising any of the duties of said office, and ousted therefrom and the same declared vacant.

A general demurrer was sustained to the petition and case dismissed. From that judgment plaintiffs have appealed.

The principal, if not the sole question, involved in this appeal is whether or not the collector is a district officer. Sec. 234 of the constitution is as follows, viz: "All civil officers for the State at large shall reside in the State, and all district, county, city or town officers shall reside within their respective districts, counties, cities or towns, and shall keep their offices at such places therein as may be required by law."

Sec. 24 of the act which authorized the bonds in question to be issued, and taxes to be levied, provides that the taxes levied in any county or part of a county shall be collected by the sheriff of such county, and taxes levied in any city or town shall be collected by the officer thereof having the power to collect taxes for ordinary purposes. (Acts of 1869-70, vol. 1, p. 352.) Sec. 28 of said act provides that if any sheriff or other officer whose duty it is to collect said taxes shall fail to execute bond, as required by law, for thirty days after the levy is made, he shall forfeit his office, and that the court or other authority levying such taxes shall appoint a collector who shall execute bond with surety, and have all the powers and be subject to all the duties and liabilities of sheriffs and other officers in collecting taxes under this act.

Sec. 4131 of the Kentucky Statutes provides that if the sheriff fails to execute bond as is required by law that he shall forfeit his office, and the county court may appoint a sheriff to fill the vacancy until a sheriff is elected, or it may appoint a collector for the county of all money due the State and county or taxing district, authorized to be collected by the sheriff, or it may appoint a separate collector of the moneys due the State, county or any taxing district, during the vacancy in the office of sheriff. It seems that the appointment of a collector for the collection of the taxes in question is authorized by the act of 1870, *supra*, and also by the Kentucky Statutes, and that for the purpose of collecting such taxes the collector has all the powers a sheriff would have and is under the same liability.

The law seems to authorize the appointment of a collector for any taxing district as well as for the entire county. There is nothing in the statute requiring the collector to be a resident of the district in which the taxes are

Webster, &c v. Wathen, &c.

to be collected, nor do we think he is a district officer within the meaning of the section of the constitution, *supra*.

It seems to us that the demurrer was properly sustained. The judgment of the court below is therefore affirmed.

CASE 52—PETITION EQUITY—APRIL 23.

Webster, &c v. Wathen, &c.

APPEAL FROM JEFFERSON CIRCUIT COURT, LAW AND EQUITY DIVISION.

PRECATORY TRUSTS.—Where a testatrix after devising all her estate to one of two sisters directed her to give to the other sister "any present that she may need and that my estate can afford," these words were too uncertain to create an enforceable trust. To create a trust it is not sufficient that the words of the testator can be construed as mandatory, and that the person intended to be the beneficiary is certain, but the subject to which the obligation relates must also be certain.

MOSES N. WEBSTER FOR APPELLANTS.

1. The object of the testatrix was clearly to give to Mrs. Webster such support and maintenance as the estate would bear, trusting Mrs. Wathen's discretion in the distribution thereof. And Mrs. Wathen could not refuse to exercise such discretion according to the true intent and meaning of the donor. (Tabor v. McIntire, 79 Ky., 505; Bohon v. Barret, 79 Ky., 378.)
2. A testator can not disinherit his heir, unless he devises the estate to some one else. (Tabor &c. v. McIntire, &c., 79 Ky., 505; 5 Leigh, 222.)
3. The paper in contest is a valid will. (Redfield on Wills, chap. 2, p. 4; Jarman on Wills, vol. 1, p. 1; Bouvier's Law Dictionary, "Wills.")
4. General legacies must yield to specific bequests. (Cameron v. Boyd's Adm'r, 4 Dana, 549.)
5. Intention must prevail; and every clause should be so construed as to give effect thereto if practicable, without contradiction. (Hunt v. Johnson, 10 B. M., 344.)

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6. The words of a will are to be interpreted in their strict primary sense, unless the context shows that they were used in a popular or secondary sense. (*Allen v. Vanmeter*, 1 Met., 277.)
7. If from the language used it can be inferred with reasonable certainty what the desire of the testator is, it will be treated by the court as a command, and executed accordingly. (*Cary v. Cary*, Sch. & Lef. Rep., 189; *Perry on Trusts*, sec. 112; *Hill on Trustees*, p. 92 and authorities cited; 66 Pa., 402; 1 N. H., 228.)

J. W. CROAN ON SAME SIDE.

1. The language of the will of Lizzie Curd is mandatory, and clearly expresses the intention of the testatrix to secure to the plaintiff, Euphemia Webster, a comfortable maintenance out of the estate devised to Hettie Wathen, and charges the estate in her hands with a trust, and requires of her the active duty of looking after the condition of Mrs. Webster, and to furnish her out of the estate such portion as her necessities and comfortable maintenance shall annually require. (*Bohon v. Barret*, 79 Ky., 378; *Major v. Herndon*, 78 Ky., 123; *Anderson v. Hall*, 80 Ky., 91; *Wager v. Wager*, 96 N. Y., 174; *McMurray et al. v. Stanley*, 6 S. W. R., 412; *Tabor v. McIntire*, 79 Ky., 505; *Perry on Trusts*, sec. 112; *Hill on Trustees*, p. 92; *Perry on Trusts*, chap. 4, 66 Penn., 402; 1 N. H., 228; *Green v. Johnson*, 4 Bush, 167.)
2. A trustee acting unfaithfully toward beneficiary is liable for any injury resulting therefrom. (*White v. Monsarat*, 18 B. Mon., 814.)
3. Administrator with will annexed is a trustee and is personally liable. (*Clemens v. Caldwell*, 7 B. Mon., 174; *King v. Beeler*, 4 Bibb, 83; *Berry v. Hamilton*, 10 B. Mon., 135; *O'Neal v. Beal*, 10 B. Mon., 273.)

THOMAS G. POORE ON SAME SIDE IN PETITION FOR REHEARING.

FAIRLEIGH & STRAUS, FOR APPELLEES.

The uncertainty as to the thing devised is fatal to appellants' contention that the words of the will create a trust in favor of Euphemia Webster. A gift declared by the testator to be unfettered, or where he recommends but does not enjoin, will not be encumbered with a trust, however strong the language of trust or recommendation may be, unless the amount of and character of the trust is certain and definite. (*Major, &c., v. Herndon, &c.*, 78 Ky., 129; *Bohon v. Barret*, 79 Ky., 378; *Sale v. Thornberry*,

86 Ky., 266; Kneffler v. Shreve, 78 Ky., 297; Ender's Ex'ors v. Tasco, 11 Ky. Law Rep., 592.)

JUDGE HAZELRIGG DELIVERED THE OPINION OF THE COURT.

The sole question in this case is whether or not the will of Lizzie Curd creates an enforceable trust in favor of the appellant Euphemia Webster.

The will reads as follows:

"St. Louis, July 8, 1883.

"Any other will or bequests that may be found shall be of no use to any one. This is my will: That if I die possessing any property of any kind, whether bonds, bank stock, money, jewelry, my watch, silverware, china ware, pictures, books, furniture, or any other goods, I hereby will it all to my sister, Hettie Cunningham Wathen, to be hers, and to be used by her for her own benefit, and for her child, little Richard Wathen, or any other children she may have, and I wanted it secured to them. I want her to give any presents to my sister, Euphemia Cunningham Webster, that she may need, and that my estate can afford. I want Hettie, as far as possible, to look after my sister Euphemia's interests, and to protect her as far as lies in her power. I want Hettie to give (for me) to my dear little Albert Lee Cunningham the sum of one hundred dollars if he is living at the time of my death. . . . I request that Hettie shall give to Sallie and Hundley each the sum of one dollar in order to prevent them interfering with my will or requests. They are rich, and have been made so by the shrewd management of their mother, who influenced my father against me and my two sisters, Euphemia and Hettie, and impoverished to make them rich. I feel no bitterness towards them, but they do not need any portion of my poor estate. . . . I desire Hettie to make a handsome present to my friend and relative

Jo Allen, who has been so very kind to me. I suggest a handsome picture, for instance."

The testatrix died in 1884, her estate consisting of money and other personal property of the value of some eight or nine thousand dollars. At the time of her death the most cordial relations existed between the three sisters, but the testatrix had taken charge of the younger one, Hettie, when the latter was quite a child, and in the language of the witnesses "became a mother to her." There existed between these two the strongest affection and most intense devotion, though the child was only the half sister of the other two.

At the time the will was made Euphemia was the wife of her co-appellant, and had, in her own right, an estate of some sixteen thousand dollars. The estate of Hettie is not clearly shown, but it appears to have been something less than that. She herself testifies that at that time she was worth nine thousand dollars.

It does not appear that the sister Hettie has ever made any "presents" to the appellant, or looked after her "interests" in any respect, or protected her to the extent of her "power," whatever was meant by these expressions of the will. And in March, 1893, Euphemia and her husband instituted this action, setting up the will and relying on its provisions as creating a trust in her behalf, and alleging that for the last eight years theretofore, the female appellant had been a confirmed invalid, requiring the constant attention of physicians and nurses, and was very poor and in need of the necessities of life. By her proof she shows that her estate has been reduced to some nine thousand dollars, and her allowance is sixty dollars per month therefrom.

The court below appears to have spared no pains in the

examination of the principles involved, and thus expresses his conclusions:

"When the devisor's intention is ascertained it must be effectuated by executing the will. If the language used, however, is so vague and inexpressive that it is impossible to ascertain with certainty the object or the subject of the precatory language, no trust will arise by implication or construction, because the intention is undefined and unascertainable. The subjects of the testatrix's wish are not defined and are, from the language she employs, impossible of ascertainment. Her wish of benefaction to her sister, Mrs. Webster, is too vaguely worded as to the subject matter of the intended bounty to be carried into execution.

How is it possible to ascertain what the testatrix intended by the words 'any presents that she may need that my estate can afford?' Who can guess what was intended by the word 'presents,' and what standard or test is to be adopted in determining the capacity of the estate to afford such presents?"

The petition was, therefore, dismissed.

The argument of the learned judge seems to us to need no further elaboration, and is clearly supported by ample authority.

Learned counsel cite Hill on Trustees (p. 74), where the author says: "However, any description, no matter how untechnical or inartificial, will be sufficient, as long as it points out clearly what is the property to which the trust is intended to apply. Therefore, the subject has been considered to be defined with sufficient accuracy by the description of 'what fortune he (the first taker) should receive under the testator's will;' or what she 'has in her own power to dispose of that was mine,' or 'the share of my property bestowed on her'" etc.

Manifestly, the description of the subject of the alleged bequests in the case at hand falls far short of pointing out clearly, or even at all, "what is the property to which the trust is intended to apply." The word "presents" in itself does not convey the impression that any permanent interest in the body of the estate was intended to be conferred, decidedly the contrary. And when to this we add the uncertain and undefined limitations prescribed in the will, the possible "need" of the sister, and the capacity of the estate to "afford" the gift, we reach a state of absolute uncertainty as to the subject to which we may apply the supposed trust. That the testatrix wanted her legatee to make some presents to her sister we do not doubt, and it may be supposed that she expected her to be more generous in doing so than in giving a present to her friend and relative, Jo Allen, but we think her wishes as to the two were of the same general nature, and the general use of the word the same in each clause of the will.

It is conceded by counsel that all the authorities agree that before a court will declare a trust to exist and enforce it, three things must be shown: 1. The words of the testator must be construed as mandatory. 2. The person intended to be the beneficiary must be certain. 3. The subject to which the obligation relates must be certain.

If we admit the existence of the first two requisites in this case, we are yet utterly unable to say that the subject to which the obligation relates is at all certain, or can be ascertained with reasonable certainty.

The "need" of the appellant, as shown by her proof, requires from one hundred and fifty dollars to two hundred dollars per month, and the estate of the appellee could afford the bestowal of such monthly "presents" only a few years at most.

"In law the maxim is familiar," say counsel, "that that is sufficiently certain that is capable of being made certain," and so we agree, but in no reported case or in any text writer can we find the principles invoked by counsel stated in such liberal terms as to be made applicable to the case at hand.

In *Bohon v. Barret*, 79 Ky., 378, the court said: "It appears with certainty that Lillie Barret is the object of the trust; that its subject is the ten thousand dollars, which the executor is requested to 'expend,' 'settle upon,' and 'use for her benefit.'" And so in *Sale v. Thornberry*, 86 Ky., 266, where the testator gave the estate to his wife in fee, adding this language: "I only make this request of her and only as a request, for I feel that her own kind heart and good judgment will prompt her to do so without, viz.: That in the event she should marry again she will see that the interests of our children in said property are protected."

The court said that in the execution of the trust, even if disposed to adjudge the language created one, the chancellor must necessarily speculate as to the extent and character of the holding by the mother and children, and the mother was held to take an absolute fee, and free from any trust. Other cases might be cited to the same effect.

We have examined with interest the numerous authorities cited by the learned counsel for the appellants, but have been unable to conclude that the testatrix created by the words, "any presents to my sister, Euphemia, as she may need, and as my estate can afford," a charge upon her estate of so definite a nature as to be enforceable by the chancellor.

Judgment affirmed.

Commonwealth v. Grand Central Building and Loan Association, &c.

CASE 53—PETITION ORDINARY—APRIL 25.

Commonwealth v. Grand Central Building
and Loan Association, &c.97 325
e108 50597 325
e127 18797 325
j128 197
e129 743

APPEAL FROM FRANKLIN CIRCUIT COURT.

1. THE JURISDICTION OF A PENAL ACTION IN THE NAME OF THE COMMONWEALTH against a corporation to recover the penalty prescribed for doing business in this State without complying with the provisions of sec. 571 of the Kentucky statutes, is in the circuit court of the county in which the offense is committed. Therefore, the Franklin Circuit Court has no jurisdiction of such an action, unless the offense was committed in Franklin county.
2. A PENAL ACTION of this kind the jurisdiction of which is not in the Franklin Circuit Court must be brought by the Commonwealth's Attorney for the district in which it is instituted. But the fact that this action was brought by the attorney-general would not affect the jurisdiction or invalidate the petition if it had been brought in the proper court.
3. JURISDICTION OF FRANKLIN CIRCUIT COURT.—Sec. 976 of the Kentucky statutes which makes the Franklin Circuit Court the fiscal court of the Commonwealth does not confer any jurisdiction on that court to try prosecutions for violations of the criminal or penal code of the State. Such having been the uniform construction and practice for more than forty years under a former statute of which this provision is almost a literal copy, the legislature must be presumed not to have contemplated any change.

WM. J. HENDRICK, ATTORNEY-GENERAL, FOR APPELLANT.

The attorney-general is the officer that the Legislature intended should institute these suits, and the Franklin Circuit Court the court to which it intended to give jurisdiction. (Const. of Ky., title, "Judiciary;" Ky. Stats., secs. 113, 114, 115, 116, 117, 118, 119, 569, 570, 571, 577, 586, 616, 594, 608, 615, 616, 621, 661, 677, 704, 729, 739, 753, 754, 793, 795, 796, 797, 798, 819, 820, 828, 830, 852, 873, 874, 875, 876, 966, 976.)

Commonwealth v. Grand Central Building and Loan Association, &c.

B. G. WILLIAMS AND SWINFORD & EVANS FOR APPELLEE LONG.

1. It was not one of the duties of the attorney-general to institute this suit. (Ky. Stats., secs. 113-118.)
2. The Franklin Circuit Court had no jurisdiction of the alleged offense. (Ky. Stats., secs. 656, 976, 113; Criminal Code, sec. 18; Civil Code, sec. 63.)
3. The court had no jurisdiction of the person of defendant. The summons was served in Harrison county.

JUDGE GRACE DELIVERED THE OPINION OF THE COURT.

The question presented in this case is one of jurisdiction of the Franklin Circuit Court, arising upon a petition filed therein in the name of the Commonwealth of Kentucky, by the attorney-general, against the Grand Central Building and Loan Association, alleging that the defendant is a corporation located and carrying on business as such in Campbell county, and that it has failed and neglected to file with the Secretary of State, at Frankfort, statement giving the location of its office in this State, and the name of any officers thereat on whom process may be served. Wherefore plaintiff prays judgment for the penalty imposed by the statute in such cases, of from one hundred to one thousand dollars. This penalty is given in such cases by sec. 571 of the Kentucky statutes, under the chapter on corporations, article 1, entitled General Provisions.

This section does not declare any special jurisdiction for the recovery of this penalty, nor that the suit shall be prosecuted by the attorney-general.

It is true that under this chapter on corporations, wherein are named all those generally doing business in the State, such as railroads, insurance companies, building and loan associations, and quite a number of others, various duties are devolved on the attorney-general in connection with same, as the examination of their charters and consultations with the secretary of State, railroad commission, in-

insurance commissioner and other officers. And while in quite a number of these cases special jurisdiction, either exclusive or concurrent with the several circuit courts in the State, is given to the Franklin Circuit Court, wherein suits may be prosecuted for many violations of this chapter on corporations, and while many of the penalties are declared recoverable in the Franklin Circuit Court, and on suits prosecuted by the attorney-general, yet in this particular statute, and for the recovery of this particular penalty, no special jurisdiction is named. So we take it that this question is to be determined by the general laws in force in Kentucky in reference to the recovery of such penalties, and this may be done either by indictment, or by action, as in this case, in the name of the Commonwealth of Kentucky.

The circuit courts are the courts of general criminal jurisdiction, and by sec. 18 of the Criminal Code it is provided: "The local jurisdiction of circuit courts and of justices' courts shall be of all offenses committed within the respective counties in which they are held." This we take to mean whether the offense is prosecuted by indictment, or as in this case by penal action.

Again, by sec. 11 of the Criminal Code it is provided: "A public offense of which the only punishment is by a fine (as in this case), may be prosecuted by a penal action, in the name of the Commonwealth of Kentucky, or in the name of an individual or corporation, if the whole fine be given to such individual or corporation. The proceedings in penal actions are regulated by the Code of Practice in civil actions."

By turning to the Civil Code we find sec. 63 provides: "Actions must be brought in the county where the cause of action, or some part thereof, arose—1. For the

recovery of a fine, penalty or forfeiture imposed by statute." So that whether we look to the provisions of the Code in procedure by indictment, or by penal prosecution, we find that the county where the offense was committed determines the jurisdiction of the court to try the case.

Neither do we find it to be the duty of the attorney-general to file this suit. As before stated this duty is not imposed on him by this special statute. And when we turn to the Kentucky Statutes prescribing the duties of both the attorney-general and the Commonwealth's attorney we find sec. 113, under head of attorney-general: "He shall attend in behalf of the Commonwealth to all cases and proceedings in which she may be interested, except where it is made the duty of the Commonwealth's attorney or the county attorney to represent the Commonwealth." . . . And by sec. 118, under head of Commonwealth's attorneys, we find: "It shall be the duty of the Commonwealth's attorney to attend each circuit court holden in his district, and prosecute all violations of the criminal and penal laws therein, and shall also, except in Franklin county, attend to all civil cases and proceedings in the courts of his district in which the Commonwealth is interested."

Thus we assert at the conclusion that a penal prosecution of this kind, the jurisdiction of which is in Campbell county, must have been brought by the Commonwealth's attorney for that district.

This question, however, does not affect the question of the jurisdiction of the proper court, nor would it invalidate a good petition.

We are referred by the attorney-general to sec. 976 of the Kentucky statutes. This section provides: "The Franklin Circuit Court shall have jurisdiction in behalf of the Commonwealth of all causes, suits and motions against the

clerks of courts, collectors of public money, and all public debtors and defaulters, or others claiming under them, and for this purpose its jurisdiction shall be co-extensive with the State."

This provision is almost a literal copy of the former statute under the old constitution in force in Kentucky for more than forty years, which statute has been commonly referred to as the "Fiscal Statute," and the Franklin Circuit Court as the "Fiscal Court" of the State. But it had never been the practice under that statute, and by reason of same, to claim that it conferred any jurisdiction on that court to try criminal or penal prosecutions, for violations of the criminal or penal code of the State, whether by indictment or by penal action. The legislature must be presumed to have had knowledge of this uniform construction and practice under the former statute, and not to have contemplated any change by its re-enactment.

It may be further said that jurisdiction under general statutes should not be ousted by implication only. Of course there is no question as to place of the commission of the offense, Campbell county.

The judgment of the Franklin Circuit Court in sustaining a special demurrer to this petition was correct, and same is affirmed.

Louisville & Nashville Railroad Company v. Ellis' Admr.

CASE 54—PETITION ORDINARY—APRIL 25.

Louisville & Nashville Railroad Company
v. Ellis' Admr.

APPEAL FROM SHELBY CIRCUIT COURT.

1. **RAILROADS—EJECTION OF DRUNKEN PASSENGER.**—Where a passenger on a railroad train was put off for refusal to pay his fare, and was soon after struck and killed by another train on the same road, if at the time of the ejection from the train he was in such mental or physical condition from intoxication or other cause as rendered him incapable of caring for himself, and as to necessarily or probably expose him to danger of death or great bodily harm in being put off at the time and place and under the circumstances, and the officers or servants in charge knew of his then helpless condition, the railroad company is liable for the damages resulting, the wrongful act of the servants in charge of the train in putting him off under the circumstances being the proximate cause of the death.
2. **SAME.**—It was error to the prejudice of plaintiff to require the jury to believe, in order to find for her, that the servants in charge of the train knew that to put her intestate off the train at the time and place and in his then condition would "necessarily" expose him to danger from passing trains. It was sufficient that it would "necessarily or probably" expose him to danger. Nor was it necessary that plaintiff should show that the servant in charge of the train knew the danger to which the decedent would be exposed. If they knew the helpless condition of the decedent the conclusive presumption arises that they knew the consequences which would follow their acts.
3. **EVIDENCE—RES GESTAE.**—It was not competent for plaintiff to prove that the conductor said when he heard that a man had been killed on the track, that "he expected it was the man he put off the train," this declaration not being a part of the *res gestae*. And in view of the testimony of the conductor and of the issues in the case, this testimony was prejudicial.

J. C. BECKHAM & SON FOR APPELLANT.

1. The statement of the conductor made more than an hour after Ellis was put off the train was not a part of the *res gestae*, and

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99 410

97 330
d103 227

97 330
104 780

97 330
e111 86

97 330
112 114

97 330
131 282
e133 648
d133 650

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was, therefore, incompetent. (McLeod, Receiver, &c., v. Ginter's Adm'r, 80 Ky., 399.)

2. Ellis by refusing to pay his fare or produce a ticket forfeited his right to ride upon the company's train, and he had no right to demand that he be put off at a station. Therefore, there was no liability upon the part of the railroad company, unless there was negligence upon the part of the servants in charge of the train by which Ellis was killed. (L. & N. R. Co. v. Logan, 88 Ky., 232.)

Sullivan v. Louisville, &c., R. Co., 81 Ky., 624, distinguished.

3. Even if the company was negligent in putting Ellis off the train, that negligence was not the proximate cause of the injury and, therefore, there is no liability. (Lewis v. Flint & Pere Marquette Ry. Co., 18 Am. & Eng. R. Cases, 265; 19 Am. & Eng. R. Cases, 301; 16 Am. & Eng. Enc. of Law, 436; L. & N. R. Co. v. Johnson,, 47 Am. & Eng. R. Cases, 611; L. & N. R. Co. v. Lewis, 14 Ky. Law Rep., 770; Ham v. President, &c., Delaware, &c., Canal Co., 21 Atl. Rep., 1112; Elliott v. Chicago, &c., R. Co., 150 U. S., 247; Schaeffer v. Railroad Co., 105 U. S., 249; McClelland v. Louisville, &c., R. Co., 94 Ind., 277; s. c., 18 Am. & Eng. R. Cases, 261.)

P. J. FOREE AND L. C. WILLIS FOR APPELLEE.

1. The statement of the conductor complained of was not calculated to prove anything, except the impression the man's condition had made on his mind, and for that it was unquestionably competent. But even if not competent it was not prejudicial.
2. The court did not err in refusing the instructions asked by defendant.

If a fellow passenger offers to pay the fare it is the duty of the conductor to receive it and carry the one in fault. (Wood's Railway Law, 1409; Ham v. President, &c., Delaware, &c., Canal Co., 21 Atl. Rep.)

As the servants in charge of the train knew that Ellis was helplessly drunk when they exposed him to the perils that resulted in his death, the company will not be heard to say that the death would not have resulted had he not been drunk. (Isabel v. New York, &c., R. Co., 27 Conn., 393; Louisville, &c., R. Co. v. Sullivan, 81 Ky., 624.)

3. The instructions given correctly present the law of the case. A railroad company must exercise the right of expulsion in a lawful and proper manner, having due regard to the safety of the person ejected, and to the circumstances of time and place and the

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- physical condition of the person ejected. (Louisville, &c., R. Co. v. Sullivan, 81 Ky., 624; Atchison, &c., R. Co. v. Weber, 52 Am. Rep., 545; Conolly v. Crescent City R. Co., 17 Am. St. Rep., 389; Wood's Railway Law, 1435; Haley v. C. & N. W. R. Co., 21 Iowa, 15; 19 Am. & Eng. Enc. of Law, 907, 908.)
4. The correct measure of damages was given. (Ky. Cent. R. Co. v. Gastineau, 83 Ky., 127; Louisville, &c., R. Co. v. Case, 9 Bush, 737; 5 Am. & Eng. Enc. of Law, p. 45; Wood's Railway Law, p. 1539; Tilley v. Hudson River Co., 29 N. Y.)
 5. The verdict is not excessive. (Tennessee, &c., R. Co. v. Roddy, 85 Tenn., 400; L. & N. R. Co. v. Shivel's Adm'r, 13 Ky. Law Rep., 905; L. & N. R. Co. v. Brook's Adm'rx, 83 Ky., 137; L. & N. R. Co. v. Mitchell, 87 Ky., 337.)

J. A. SCOTT OF COUNSEL ON SAME SIDE.

JUDGE PAYNTER DELIVERED THE OPINION OF THE COURT.

The administratrix of Stephen N. Ellis, deceased, brought this action against the Louisville & Nashville Railroad Company to recover damages, alleging that the decedent was a passenger on a train of the appellant on his way from Lexington, Kentucky, to Croppers; that the officers and agents of the appellant in charge of the train unlawfully, wrongfully, wilfully, and negligently ejected the decedent from the train while he was physically and mentally incapable of taking care of himself, and placed him in an exposed and dangerous position, where he was shortly afterward run over and killed by another train in charge of appellant's agents on the same line of railroad; that the deceased was lying unconscious upon the track when so killed.

The killing took place on the 2d day of September, 1892. The trial resulted in a verdict and judgment for appellee in the sum of eleven thousand dollars.

The undisputed facts are that on the morning of the day Ellis was killed he obtained a round trip ticket over the appellant's road from Croppers to Lexington, and that he got

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aboard of the train from which he was ejected, which left Lexington going in the direction of Croppers.

On the trial of the case much testimony was offered by both sides, some of which was of a very contradictory character.

The appellee introduced a number of witnesses whose testimony tended to prove the following state of facts: That the deceased was in Lexington on the day he was killed, and had been drinking very heavily; that he was about the depot in the evening before the train started in a very intoxicated condition; that a friend who was with him endeavored to keep him from getting on the train from which he was ejected, telling him it was not the train upon which they should return, and notwithstanding the effort to prevent him the deceased got aboard the train and left Lexington on it.

One witness, speaking of the condition of deceased just before he left Lexington, said "he was very drunk. He seemed to be almost in a lifeless condition. He could walk about, but seemed to be not sensible at all."

Another witness said: "I could see he was very drunk. They had hold of him holding him up."

Woodford Hughes was on the train from which Ellis was ejected, and in speaking of his condition said: "He was very drunk, staggering around, sitting around sometimes, and getting up, falling around first against one man and then against another."

Other witnesses testified as to his drunken condition, but to whose testimony it is unnecessary to invite especial attention. Viley's Station is a short distance from Lexington.

Witnesses testified that the deceased was not put off at that station, but that he was carried four hundred or five hundred yards beyond the station, and put off in a cut; that

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there was a ditch along the track, and the testimony tended to prove that there were considerable banks on either side of the track where he was put off, fences on either side and no outlet at that point from the track.

The testimony introduced by appellee conduced to prove that deceased was very drunk when put off, and was left standing near the track, stooped over and acting in a way which indicated that he did not know what to do. It is inevidencethat one passengerappealed to the conductor not to put deceased off in "that condition but take him to a station."

There was proof that the Chesapeake & Ohio express train, which uses the road of the appellant, was to soon follow the train upon which the deceased had taken passage.

The testimony in the record shows that the train from which deceased was ejected left Lexington 6:03 p. m. The express train just mentioned was due to leave Lexington at 6:35 o'clock, but left six or seven minutes late.

The appellant introduced a number of witnesses tending to prove that the deceased was put off the train at Viley's Station on the opposite side of the road from the station; that the deceased was able to and did walk off the train himself; that he was not so drunk as to be incapable of taking care of himself.

It introduced testimony tending to prove that the first blood was seen on the track at a point two thousand nine hundred and twenty feet from Viley's, in a cut, from which appearance it is argued that that is the point where the train struck the deceased.

It is claimed for the appellee that the deceased when ejected from the train was physically and mentally incapable of taking care of himself, and that he was put off in a

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cut some distance from a station, an unsafe place; that the officers and agents knew his condition when they ejected him; that the deceased was quiet and not disturbing the passengers, and that a passenger offered to pay his fare before he was put off; that the deceased was killed by a train which followed in a few minutes the one from which deceased was ejected, and that officers and agents of appellant knew the fact when they ejected the deceased; that deceased was killed by this train.

For the appellant it is claimed that the deceased was put off at one of its stations for his failure to produce a ticket or pay his fare on the demand of the conductor; that the deceased was not so drunk as to be physically or mentally incapable of taking care of himself; that when he was ejected he was placed at a reasonably safe distance from passing trains, and that the appellant is not liable in damages for killing the deceased, as it is not responsible for deceased coming on the track, and the proof showing that the officers and agents in charge of the train that killed Ellis did not discover his peril and could not have prevented the killing by the exercise of reasonable care after discovering him on the track.

There is no evidence in the record tending to show that the officers or agents in charge of the train which is believed to have killed Ellis were guilty of any negligence whatever. If appellee is entitled to recover from the facts developed in this record it must be on account of the conduct of the officers or agents of the train from which the deceased was ejected.

A number of instructions were offered by counsel for appellant and appellee, all of which were refused by the court. The court then gave the jury three instructions, the effect of which was that the jury could not find for the appellee,

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unless the jury believed from the evidence that at the time the deceased was ejected from the train he was in such a state of intoxication as to render him mentally or physically incapable of taking care of himself, and in such helpless condition that to put him off the train at the time and under the circumstances, and in the place where he was ejected, would, necessarily, expose him to danger of death or great bodily harm from passing trains, and that appellant's agents in charge of the train at that time knew the then helpless condition of the deceased and the danger to which he would be exposed by being then and there ejected from the train, and that they at that time and under the circumstances, and in the place where he was ejected, and with the knowledge of such helpless condition, forcibly, wilfully and negligently ejected him from the train; and that he was shortly thereafter, while so mentally and physically unable to take care of himself, and in such helpless condition, run over and killed by another train in charge of appellant's officers or agents.

The instructions given by the court recognize the right of the appellant to eject deceased when he failed to produce a ticket or pay his fare, unless some one else offered to pay and tendered his fare, and which offer and tender was refused by the conductor.

By the instruction, No. 3, which the court gave the jury, the recovery was confined to compensatory damages.

Instruction No. 1, offered by counsel for appellant, told the jury, in substance, that if the decedent failed to produce his ticket or pay his fare the conductor or other agent or servant of the appellant had the right to eject him, using no more force than was necessary for the purpose, and if the decedent was placed so far from the track that he was then out of danger of passing trains, and that he afterwards

went upon the track and was killed by another of appellant's trains, the jury should find for the appellant, unless they further believed that appellant's officers and agents in charge of the train that killed decedent discovered his peril, and could have prevented the killing by the exercise of reasonable care after discovering him on the track. It is insisted that this instruction should have been given to the jury.

This contention brings us to the consideration of the question as to the right of the appellant's officers or agents in charge of a train to eject one who is not imperiling the safety of the passengers, but who has forfeited his right to ride upon the train, regardless of the time, place, and circumstances, and his physical and mental condition.

Under this instruction the jury could not find against the appellant if they believed that the decedent was placed so far from the track that he was then out of danger of passing trains, and he afterwards went upon appellant's track and was killed by another train, unless they believed that the officers and agents in charge of such train discovered his peril, and could have prevented the killing by the exercise of reasonable care after discovering him on the track. This instruction assumes that the agents of appellant had the right to eject decedent, regardless of the time, place, circumstances, and his physical and mental condition. This certainly is not the law in this State.

It seems to us that the ordinary principles which characterize humanity condemn such claim. If the claim of appellee be true that the decedent was ejected in a cut, away from any station—with banks and fences on either side of the track—in such mental or physical condition as rendered him incapable of taking care of himself, the officer with a knowledge of his condition, then it was no less wrong to eject decedent under such circumstances than it would have

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been to have ejected from a train a toddling child who had not mental capacity to know the danger of walking upon a railroad track, or the physical ability to avoid such danger if it had the mental capacity to discern it. Would any one contend if appellant should kill a child under such circumstances that it would not be liable to damages therefor?

The fact that the deceased by his own act became intoxicated to the extent which rendered him incapable of taking care of himself does not release the appellant from liability for the acts of its officers and servants in ejecting him. The intoxication of the decedent is the remote but may not be the proximate cause of the killing.

While the facts of this case differ somewhat from those of the case of Louisville, Cincinnati & Lexington R. Co. v. Sullivan, 81 Ky., 624, the principles enunciated in that case are applicable to this one. Sullivan was ejected from a train in freezing weather, while in a helpless condition, resulting from intoxication, and as a result his feet, hands, and other parts of his body were frozen, causing suffering and the amputation of his toes, etc.

The court in the Sullivan case said: "But about one hour and a half afterwards (referring to the time of plaintiff's expulsion), near the time for the train going toward Christiansburg to pass, and about two hundred and fifty yards toward Croppers from the place where the conductor testifies he was put off the train, he was discovered by one of the witnesses lying across the track helpless and nearly unconscious, with a quart bottle nearly full of whisky, who pulled him off the track, but being unable to remove him from the place left him."

Suppose the train which was to soon pass going to Christiansburg without any negligence of those in charge of it should have run over and killed Sullivan, and the action had

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been for the damages resulting from the killing, can any one doubt that the court in that case would have held that the railroad company was liable?

The killing would have been as proximately the result of the wrongful act of expulsion as was the injury by freezing.

In the case of *Louisville & Nashville R. Co. v. Logan*, 88 Ky., 241, the court said: "There might be a case where a railroad company would be guilty of willful neglect, in the meaning of the statute, by ejecting without imperative necessity a passenger so drunk as to be helpless, when his death would naturally and probably result from agencies other than his own act then present and impending."

In the *Logan* case *supra* the court very properly held that the railroad company was not liable for the killing, as the deceased remaining on the train imperiled the safety of the passengers, but his condition was not such as indicated to the officers and agents in charge of the train that he was incapable of taking care of himself.

Gill v. Rochester & Pittsburgh R. Co., 37 Hun. (N. Y.) 107, was an action to recover damages ensuing from the death of the plaintiff's intestate, Arthur O. Gill, alleged to have been caused by the negligence of defendant in ejecting him from its train.

The deceased was a passenger on the defendant's train that left Le Roy, running westwardly, at about half past seven on the evening of Saturday, 24th of February, 1883. For failing to produce a ticket or pay fare the train was stopped and he was put off at a point something over a mile distant from the Le Roy station and 115 rods from the nearest accessible dwelling house. The night was dark, cold and stormy. As the train moved away the deceased was seen standing or leaning against the bank of the cut.

No witness spoke positively of having seen him after that

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until the following Monday morning, when his dead body was found on the opposite side of the track from which he was put off, lying in partially frozen mud and water.

The immediate cause of his death was suffocation or drowning.

To establish the liability of the defendant two theories were presented by the plaintiff: First, that the deceased was put off with unnecessary violence, and was so stunned or paralyzed thereby as to be incapable of taking care of himself; and secondly, that he was so intoxicated as to be incapable of caring for himself to the knowledge of the conductor when he was put off the train.

Testimony was introduced tending to sustain the contention of plaintiff. The court said: "Upon either theory presented to the jury, whether the deceased was incapacitated from caring for himself by intoxication or by a paralyzing stun, if he was in fact so incapacitated and so continued until he perished, we think his ejection from the cars, under the circumstances, must be regarded as the proximate cause of his death. By reason of his incapacity no voluntary and conscious act of his own could intervene between the original cause and the final result, and the case is the same in legal effect as if, when ejected from the car, he had been thrown into a pool of water and instantly drowned." (Conolly v. Crescent City R. Co., 41 La. Ann., 57; s. c. 17, Am. St. Rep., 389; Haley v. C. & N. W. R. Co., 21 Iowa, 15; Atchison, Topeka & S. F. R. Co. v. Weber, 52 Am. R., 545.)

We are of the opinion that if the deceased was ejected from the train when he was in such mental or physical condition from intoxication or other cause as rendered him incapable of caring for himself, and the officers or agents in charge of the train knew of his then helpless condition, and to put him off the train in such condition at that time and

under the circumstances, and in the place where he was ejected, would necessarily or probably expose him to danger of death or great bodily harm from passing trains, and that while in such condition he was, shortly after his expulsion, run over and killed by a train on the road of appellant, the appellant is liable for the damages resulting, for killing him. It follows from this view of the case that the court did not err in refusing the instructions offered by counsel for appellant, nor did the court err to its prejudice in instructing the jury.

The instructions given were more favorable to the appellant than it was entitled to, in using alone the words "necessarily expose," etc. It should have been said "necessarily or probably," etc.

In referring to the ejection of the deceased, language was used in the instructions as follows: "That defendant's agents in charge of said train at that time knew the then helpless condition of the deceased *and the danger to which he would be exposed by being then and there ejected from said train.*"

So much of these instructions as required the jury to believe from the evidence that the agents in charge of the train knew of the helpless condition of deceased when they ejected him is correct.

But in so far as they required appellee to prove that such agents knew the results which would necessarily or probably follow from the act of expulsion, they are incorrect. If the helpless condition of the deceased at the time of his expulsion is shown, and that the agents in charge of the train knew of it when they so expelled him, the conclusive presumption follows that they knew the consequence which would follow such acts. Otherwise, it would be a most difficult task to hold a party liable for a tort. It would, in many cases,

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be impossible to prove the party who was charged with the wrongful act knew what would result from it. And from the criticism we have made upon the instructions given by the court, we think they state substantially the law of the case.

There was an error committed to the prejudice of the appellant, which makes necessary a reversal of the case.

Woodford Hughes was introduced as a witness for the appellee, and, over the objection and exception of counsel for appellant, gave testimony as follows:

By counsel for appellee: "I will ask you if any member of that train was present when you talked with the policeman at Frankfort?"

A. "The conductor was there."

Q. "Fitzgerald?"

A. "Yes, sir."

Q. "Tell what was said."

Question objected to by defendant. Objection sustained.

Q. "I will ask you if when you got to Frankfort you got any announcement that a man had been killed back up the road?"

A. "Yes, sir."

Q. "How did you get the news? Don't tell what was said, but tell the manner of getting it. Was it a telegram, do you know?"

A. "I don't know how; whether there was a telegram or not; but I heard them say there was a man killed."

Q. "I will ask you whether at that time you heard the conductor make any statement as to who he thought it was?"

Question objected by defendant. Objection overruled, to which defendant by counsel excepted.

A. "*He said he expected it was the man he put off the train.*"

This testimony is incompetent. It was no part of the *res gestae*. The conductor is the agent of the appellant for the purpose of operating the train. No statement or declaration of his can bind the appellant, except it was made under such circumstances as to make it a part of the *res gestae*.

The court in the case of McLeod, receiver, v. Ginther's Adm'r, 80 Ky., 399, held the statements of the conductor were admissible as part of the *res gestae*, which were made in a few seconds after the accident which resulted in the death of Ginther, and in view of the wrecked train and amidst the search for persons whose fate was then unknown. The court in McLeod v. Ginther's Adm'r, *supra*, said:

"The general rule is that all declarations made at the same time the main fact under consideration takes place, and which are so connected with it as to illustrate its character, are admissible as original evidence, being what is termed a part of the *res gestae*, in other words, a part of the thing done."

The declaration in question was not made at the time of the expulsion, nor at the time of the killing, but a considerable time afterward.

The declaration of the conductor as proven by Hughes was introduced as original evidence.

Doubtless, the jury regarded it as tending to contradict the testimony of the conductor when he says he put deceased off the train at Viley's, and also when he says that the deceased was not in the helpless condition as claimed by appellee. The jury may have regarded it as an acknowledgment of the conductor that he knew the deceased was in a helpless condition when ejected.

The court can see how counsel for appellee could have used it in argument effectively. It may have weighed heav-

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ily with the jury in reaching its conclusion as to the condition of the deceased when expelled, and as to the knowledge of the conductor as to such condition.

It is fair to conclude that the jury was, in no small degree, influenced by the testimony in making up their verdict, as they would naturally reason that the conductor would not have "expected" the man he put off the train to be killed if he had put him off at a station and in a condition wherein he was capable of taking care of himself.

The statement of the conductor not being part of the *res gestae* was incompetent evidence, and it was an error of the court in allowing it to be proven.

Wherefore the judgment is reversed with directions that a new trial be granted, and for further proceedings consistent with this opinion.

CASE 55—PETITION EQUITY—APRIL 26.

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APPEAL FROM BELL CIRCUIT COURT.

1. PURCHASE AT TAX SALE FOR BENEFIT OF INFANTS.—Where the land of infant heirs was sold to satisfy a claim for taxes, and purchased by an uncle of the infants for the amount of the claim, pursuant to an agreement made by him with his brother before the sale that he would bid in the land for the infants, the children of the deceased brother, and it was publicly announced at the sale that his bid was for the benefit of the children, and others were thus deterred from bidding, these facts are sufficient to create a trust in favor of the infants, and they are entitled to have the land reconveyed to them by the purchaser, and to recover the reasonable value of the use of the land since he has had possession.
2. SAME—LIMITATION.—The plea of the statute of limitations can not

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be made available, as there was a subsisting trust in favor of plaintiffs. Besides, some of the plaintiffs are still infants and limitation does not begin to run against any until the disability of all is removed.

D. B. LOGAN FOR APPELLANT.

1. As appellees have failed to show by legal evidence that they or either of them had any interest in or title to the land in controversy at the time of appellant's purchase at the auditor's sale, appellant's alleged statements made at the sale can be considered nothing more than a statement of his intention to create a trust in favor of appellees. This would be at most then an unexecuted or incomplete voluntary trust, which is not enforceable. (2 Pomeroy's Eq. Jur., 2 ed., secs. 996, 997.)
2. If the statements alleged to have been made by appellant upon the day of sale are considered fraudulent, then the statute of limitations bars appellees' right to relief at this distant day, even had they owned an interest in the land and were seeking to cancel the purchase on the ground of fraud.

TINSLEY & TINSLEY FOR APPELLEES.

1. Appellant by publicly proclaiming that he was bidding for the heirs, and that it was their bid, prevented bidding by other persons who were present for that purpose. This was fraudulent and made him trustee. (Bispham's Principles of Eq., sec. 218; 10 Am. & Eng. Enc. of Law, p. 63 and authorities cited; Martin v. Martin, 16 B. Mon., 8.)
2. The plea of limitation can not avail. (Gen. Stats., chap. 71, art. 4, sec. 20.)

JUDGE EASTIN DELIVERED THE OPINION OF THE COURT.

This action was brought by appellees, who are the widow and children of Wm. Vanbever, deceased, against appellant, George Vanbever, who is a brother of said decedent, for the recovery of a small tract of land in Bell County, Kentucky, and for the reasonable value of its use and occupation for a period of about nine years.

It is alleged, in substance, in the petition, that said Wm. Vanbever purchased this land from one W. D. Howard, in

the year 1879, and was occupying and in possession of it at the time of his death, which occurred soon after said purchase, and in the same year. That there was then a small claim for State taxes, which had accrued from the year 1877, and while the land was owned by Howard, and that under a sheriff's sale, in the year 1878, the land had been purchased by the Commonwealth for this tax bill. That subsequent to the death of Wm. Vanbever, to-wit, in the year 1881, the auditor's agent for the county of Bell offered this land for sale at public auction, to satisfy this same tax claim, and that, at this sale, the appellant became the purchaser, at the price of one dollar and eight cents, the amount of said claim, and subsequently received a deed therefor from the auditor of the State; that he soon afterwards took possession under his deed, and has had the use of the land up to the time of bringing this suit, a period of nine years or more. It is further alleged that the four children of Wm. Vanbever, all of whom are appellees here, were all under the age of twenty-one years at the time of said purchase by appellant, and that said purchase was so made by him with the understanding and upon the representation and statement, then publicly made by him, that he was making it for the benefit of the infant appellees; that other persons were thereby deterred from bidding on the land; that no effort was made to secure a bid of the amount of the State's claim for a less quantity than the whole of the land, which is alleged to have been of the value of at least five dollars per acre at that time, and is now worth much more; that the facts and circumstances surrounding the purchase by appellant made him a trustee for said land for the benefit of said appellees, with the right on their part to a conveyance of same upon repaying to appellant the amount paid by him therefor, with legal interest; that they have tendered this

amount to appellant and demanded said conveyance, which has been refused; and to enforce the alleged trust and to obtain possession of said land, and to recover the value of its use from appellant, this action was brought.

The answer, besides containing a general denial of the material allegations of the petition, also relies in defense upon the statute of limitations. Appellant also contends that there is a failure to show any record title to this land in the ancestor of appellees, as the copy of the deed from Howard to him, which is filed and relied on for that purpose, not only fails to locate and describe this land by metes and bounds, but contains an express reservation and exception from the tract conveyed, of so much of this tract as had theretofore been sold to George Vanbever, under an order of the Bell Circuit Court.

It is manifest, however, that the language of this reservation does not include this land, and that the land here in controversy is not the land there referred to as "the land heretofore sold to George Vanbever by an order of the Bell Circuit Court," as this land had not then been sold to appellant, George Vanbever, and was not sold to him by an order of the Bell Circuit Court, but was, in fact, sold to him long after the date of the deed which uses this language, and was sold to him by the auditor's agent and not by any order of court.

While, therefore, the title deed exhibited is not very definite in its description of the land, yet we think it sufficiently clear to show that this was the land conveyed, especially as it is shown that the ancestor of appellees was in possession of this land at and prior to the time of his death, and that he owned no other land.

The proof taken in the case was directed almost exclusively to the establishment of the alleged trust in favor of

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appellees, and to showing the value of the land and of its use during the time that appellant has had possession of it.

As to the latter point, it is sufficient to say that it satisfactorily appears that the land was worth from one hundred and fifty to two hundred dollars at the time of the sale, and was worth about double that amount at the bringing of this suit, and that the use of the land was worth twenty dollars per year for the nine or ten years that it has been in appellant's possession.

Towards establishing the trust, it is shown by the deposition of James Vanbever, a brother of appellant, and an uncle of the claimants, that, at the time of and before the sale at which appellant bought, it was agreed between him and appellant that the latter should bid in the land, for the debt, interest, and costs, for the benefit of these infant children of their deceased brother, the appellees here; that it was publicly announced when the property was offered that appellant's bid was for the benefit of the children; that both he and appellant knew that there were other persons present with the money ready to bid on the land; that it was the purpose of himself and appellant to prevent them from bidding; that one E. F. Green, who was present, said, "let them have it; give it to the children;" and that appellant "stepped up and bid the debt and cost for the benefit of the children, and so stating, and that was the only bid."

The same facts are testified to by E. G. Wilson, who says that it was agreed between himself, the appellant and E. F. Green, just before the sale was made, that appellant should make this bid for the benefit of the children; that he announced the fact and made the request that no one should bid against appellant; that he himself had gone to the sale for the purpose of bidding on the land, and had the money to pay for it, all of which was known to appellant, but that

he "could not afford to bid against the children," though, otherwise, he should have bid on the land.

While these facts are denied by appellant, yet we think they are abundantly established by the evidence, and the only question on this branch of the case is whether or not they establish a trust in favor of these children, against the appellant, who purchased under these circumstances.

It is insisted for appellant that no trust was created, for the several reasons, that appellant owed no duty to appellees in this matter, and was under no obligation to protect their property in this way; that there was no undertaking on his part, directly to or with the children, whereby they were prevented from having a representative at the sale; that there was no consideration for any such undertaking, and that there being no writing to evidence any such agreement, it would be invalid under the statute of frauds.

It may be true that appellant owed no legal duty to these infant children to protect their property at this sale, but they were the children of his deceased brother, and he undertook to do it, and announced his purpose so to do it, and thereby deterred other bidders, and caused a most ridiculous sacrifice of the property. It may be true that he gave them, personally, no assurance that he would buy for their benefit, and that they were not thereby prevented from having another representative present in their interest, but he did give this assurance to others who were interested, or should have been interested, as he should have been by the demands of their helpless condition and by the claims of consanguinity, in protecting this insignificant patrimony from sacrifice, and, by his conduct, made himself their representative in this matter. It may be true that, under the statute of frauds, there should be a writing to evidence any contract concerning lands, but shall a man, standing in this

relation to infants, be permitted thus wilfully to take advantage of their helplessness, and to perpetrate upon them the grossest and most glaring fraud?

We think not; and the purchase money paid by appellant having been tendered back to him with interest, as is shown to have been done in this case, he was bound in equity and in good conscience to have surrendered his purchase to appellees, for whose benefit it was made.

This principle has so often been recognized by this court that the citation of authorities is unnecessary, but it is clearly established by the cases of *Martin v. Martin*, 16 B. Mon., 14; *Miller's Heirs v. Antle*, 2 Bush, 407; *Crutcher v. Hord & Wife*, 4 Bush, 360, and elsewhere.

As to the plea of the statute of limitations, we can not see how it can be made available in this case, since we have seen that there was a subsisting trust here in favor of appellees. (General Statutes, chap. 71, art. 4, sec. 20; Ky. Stats., sec. 2543.) And, in addition to this, all of these children were infants at the time this cause of action arose, two of them are still infants, and by the well settled rules of law in this State, limitation would not begin to run against any, until the disability of all was removed.

It is our opinion, therefore, that the judgment of the lower court was correct in enforcing this trust and decreeing a reconveyance of this land to the children of Wm. Vanbever, and adjudging that they recover of appellant the sum of one hundred and eighty dollars, as the reasonable value of the use of said land since he has had possession of the same, subject to the credit allowed in the judgment.

And for the reasons above indicated the judgment is affirmed.

Washle, &c v. Nehan.

*CASE 56—PETITION EQUITY—OCT. 13, 1881.

Washle, &c v. Nehan.

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APPEAL FROM LOUISVILLE CHANCERY COURT.

ASSESSMENTS FOR STREET IMPROVEMENTS.—Under the amendment of Feb. 20, 1873, to the charter of the city of Louisville, the relative location of the fourths of squares, and not of the lots, determines what property is liable to assessment for the improvement of any public way, whether it be a street or an alley. And no lot is liable to assessment for such improvement unless the fourth of a square in which it lies is contiguous to the improved way.

JNO. S. JACKMAN AND JAMES S. RAY FOR APPELLANTS.

As the property sought to be subjected is not within the fourth of the square binding on, adjacent or contiguous to the improvement, the court erred in subjecting the property. The cost of improving alleys in the interior of a square must be apportioned in the same way as the cost of making streets. (*Schmelz &c., v. Giles, &c., 12 Bush, 495.*)

, W. P. LINCOLN FOR APPELLEE.

1. Sec. 2, of the act of Feb. 20, 1873, repealed sec. 12 of the city charter.
2. In *Schmelz v. Giles, 12 Bush, 491*, the court lays down a uniform rule for apportioning inter-square improvements, which is "that the assessment should extend on each side of the alley to the nearest parallel street."

CHIEF JUSTICE LEWIS DELIVERED THE OPINION OF THE COURT.

Appellee brought this action upon apportionment warrants to recover of appellants the amounts assessed against them respectively to pay for the improvement of an alley done by him under a contract with the city of Louisville, and to enforce liens upon their lots to satisfy his demands.

Appellants filed a general demurrer to the petition, which

*This case was not ordered to be reported at the time it was decided. It is now reported pursuant to a recent order of the court.

was overruled. They then filed a joint answer and amended answer, but the court sustained demurrers to both, and rendered judgment against them for the amounts claimed in the petition, and for a sale of their lots. And they have appealed to this court.

As appears from a diagram made part of the answer the alley improved by appellee extends from Congress street, west of Twentieth, north, to a point less than half the distance to Market street; thence east, forming a right angle, to Twentieth street. The alley is entirely within the south-east fourth of the square, and is not touched by a fourth of the square in which the lots of appellants are located.

The question presented is whether appellants are, by the second section of the act to amend the city charter of Louisville, approved Feb. 20, 1873, made liable to assessment to pay for the improvement.

The 12th section of the act establishing the new city charter, approved March 3, 1870, has been frequently construed by this court, and though the second section of the act of 1893 was passed in lieu of it, there is no difference between the two in respect to assessments to pay for the original construction and improvement of public ways in that city. In both acts it is provided that "such improvements shall be made at the exclusive cost of the owners of lots in each fourth of a square, to be equally apportioned by the general council, according to the number of square feet owned by them respectively, except that corner lots, say thirty feet front, extending back as may be prescribed by ordinance, shall pay twenty-five per cent. more than others for said improvement."

The object of the legislature in thus localizing taxation for such purposes is to require each improvement to be made at the cost of those presumed to be specially and directly

benefited by it, and to prevent arbitrary and unequal assessments without equivalent advantages. And according to the only reasonable construction of the acts, and the one heretofore uniformly given by this court, the relative location of the fourths of squares, and not of the lots, determines what property is liable to assessment for each improvement.

In the case of *Schmelz v. Giles &c.* 12 Bush, 494, this court uses the following language: "It was the intention of the legislature that each improvement should be made at the cost of each contiguous fourth of a square. The reason for such rule of assessment is obvious; the effect of its operation is to charge the cost upon the property which is most benefited by the improvement, and which ought therefore, in justice, to pay it. The same principle we think not only can, but ought to, be applied in making assessments for improvements in the interior of a square. The contiguous property is more benefited by the improvement of an alley, and should pay for it for the same reason. There is no distinction made by the act of the legislature between streets and alleys; the rule by which to determine what property shall be assessed for improving one applies to the other.

Counsel for appellee refers to the case of *Schmelz v. Giles, supra*, to sustain the judgment of the chancellor. In that case the alley extended through a square, and though dividing it into unequal parts, the lots assessed were contiguous to the alley. In this case neither the lots of appellants, nor the fourths of squares in which they are located, touch the alley improved. Besides, on account of the peculiar shape of it, none but those whose property front upon it will be benefited by it.

We are of opinion the lots of appellants, not being in a fourth of the square contiguous to the alley, are not liable

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to assessment to pay for improving it, and the chancellor erred in overruling the demurrer to the petition, and in sustaining it to the answer and amended answer.

Wherefore, the judgment is reversed and cause remanded for further proceedings consistent with this opinion.

CASE 57—PETITION EQUITY—APRIL 18.

Dumesnil, &c v. Shanks, &c.

APPEAL FROM JEFFERSON CIRCUIT COURT, LAW AND EQUITY DIVISION.

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1. **ASSESSMENTS FOR STREET IMPROVEMENTS.**—In apportioning the cost of street improvements in the interior of a square the general rule is that the cost must be borne by all the property owners within the four quarters of the square; and under this rule the word "square" is ordinarily construed as meaning any subdivision of territory surrounded on all sides by principal streets. But there are exceptions to this rule, and this definition of the word "square" is not of universal application. Each case must be largely considered and disposed of upon its own peculiar facts, one of the cardinal and controlling considerations underlying the whole question being based upon the idea that the property benefited by the improvement should bear the expense.

In this case the improved alley lies within that subdivision of territory in the city of Louisville bounded on the east by Fourth street, on the north by Ormsby avenue, on the west by Sixth street and on the south by Park avenue. The alley begins at Park avenue, two hundred feet east of Fourth street, and runs north two hundred and sixty feet. The distance from Park avenue to Ormsby avenue is four hundred and sixty feet and from Fourth street to Sixth street is nine hundred feet. The length of this territory from east to west is about double that of the squares on the north side of Ormsby avenue, arising from the fact that Fifth street, which runs half way between and parallel with Fourth and Sixth streets up to the north side of Ormsby avenue, stops there. Held, That the cost of the improvement of the alley should be apportioned over the property

Duaneil, &c v. Shaks, &c.

lying east of a line corresponding with the center of Fifth street, if extended.

2. **SAME.**—While this court has held that where the alley improved lies wholly within one of the quarter squares the other three-quarters can not be required to pay any part of the cost, thus establishing an exception to the general rule, it does not follow that in every case where it lies wholly within two-quarters of the square those two-quarters alone must pay for it.

GRUBBS AND MORANCY FOR APPELLANTS.

The quarter square is the taxing district; and each quarter square should pay for so much of the improvement as binds upon it and no more. (*Cooper v. Nevin*, 90 Ky., 85; *Boone v. Nevin*, 15 Ky. Law Rep., 547; *Schmelz v. Giles*, 12 Bush, 494; *Washle v. Nehan*, MS. Op. (97 Ky., 351); *Meyer v. Zell*, 14 Ky. Law Rep., 816; *Zable v. Connelly*, 6 Ky. Law Rep., 309; *Shadburn v. Connelly*, 6 Ky. Law Rep., 600.)

LANE & BURNETT FOR APPELLEES.

When the way as improved is located wholly within one of the quarters of the square, that quarter is alone chargeable with the cost of the improvement. When the way as improved is located in more than one of the quarters of the square the whole square is liable, and nothing less than the square is chargeable. (*Connelly v. Zable*, 6 Ky. Law Rep., 309; *Connelly v. Shadburn*, 6 Ky., Law Rep., 600; *Meyer v. Zell*, 14 Ky., Law Rep., 816; *Washle v. Nehan*, *Burnetts' Code*, 756 (97 Ky., 351); *Schmelz v. Giles*, 12 Bush, 491.)

JUDGE EASTIN DELIVERED THE OPINION OF THE COURT.

The only question to be considered on this appeal is whether or not appellants have been properly assessed with a portion of the cost of improving a certain alley in the city of Louisville. As has been the case in most of the controversies of this nature, the question is not free from difficulty, and, as has been done in most of the other cases involving similar questions, this case must be largely considered and disposed of upon its own peculiar facts.

The alley in question here lies within that subdivision of

territory, called and considered by the court below a "square," which is bounded on the east by Fourth street, on the north by Ormsby avenue, on the west by Sixth street, and on the south by Park avenue, and beginning at the north line of Park avenue, at a point two hundred feet east of Fourth street, runs northwardly a little more than half way to Ormsby avenue, or to be more accurate, to a point thirty feet north of a line drawn mid-way between Park avenue and Ormsby avenue, and there opens into or unites with another alley running eastwardly to Fourth street.

The distance from Ormsby to Park avenue is about four hundred and sixty feet, and from Fourth to Sixth street is about nine hundred feet, and, as said above, this subdivision of territory was treated, both by the city engineer and by the court below, as a square for the purpose of paying for this improvement and, being divided into four equal parts or quarters, the cost of this alley was apportioned and assessed against the property embraced in each of these quarter squares equally, according to the number of square feet of ground in each. While there is no street running north and south through this territory between Fourth and Sixth streets, thus leaving it of the depth of nine hundred feet, yet it is admitted that the territory on the north side of Ormsby avenue between these last-named streets is traversed by a principal street sixty feet wide, known as Fifth street or Garvin Place, which runs into and stops at Ormsby avenue mid-way between Fourth and Sixth streets, and which, if extended, would divide the square under consideration into two squares about equal in depth back from Fourth and Sixth streets respectively, to the squares north of Ormsby avenue.

The plat, which forms a part of the record, shows that the alley lies almost wholly within one of these quarter squares

—the south-eastwardly one—only extending to the distance of about thirty feet into the north-eastwardly quarter square, and not touching or binding upon any part of the ground within the north-westwardly or south-westwardly quarter square, but being distant, at its nearest point, more than two hundred feet from either of these two last-named quarter squares. It further shows that the property assessed on the east side of the alley, running back to Fourth street, has a depth of two hundred feet, while that assessed on the west side, running back to Sixth street, has a depth of about seven hundred feet, and that the center line running through this square north and south, for the purpose of dividing it into quarters, is just about the same distance west of the alley as Fourth street, the eastern boundary of the square, is east of it. So that about three-fourths of the ground assessed lies on the west side of the alley and one-fourth on the east side, and all the ground in the two westwardly quarters is entirely separated and cut off from the alley by the intervention of about one-half in width of the two eastwardly quarters.

The court below sustained the apportionment made by the city engineer, assessing the cost equally upon all the ground embraced in the four quarter squares as above designated, and sustained a demurrer to the answer, and adjudged that appellants, who are the owners of the ground lying within the two westwardly quarters, pay the proportion assessed against their lots, from which judgment they prosecute this appeal. Were the appellants properly charged with any part of this improvement, or can any part of its cost be legally assessed against the property in these two westwardly quarter squares?

It is manifest that the court below has been guided by the rule laid down by the charter and generally recognized by

the courts, that the costs of these improvements in the interior of a square must be borne by all the property within the four quarters of the square, and by that definition of the word "square" which ordinarily construes it as meaning any subdivision of territory surrounded on all sides by principal streets.

But, is this rule inexorable and iron-bound in all cases, and is this definition of universal application? We certainly think not.

In the case of *Washle v. Nehan*, MS. opinion, Oct. 13, 1881 [97 Ky., 351], this court held that, when the alley improved lies wholly within one of the quarter squares, the other three quarters can not be required to pay any part thereof, clearly establishing an exception to the rule. And while we can not adopt the reasoning of counsel for appellants, who argue that, if this be the case where the improvement lies within one quarter, it must also follow that where it lies wholly within two quarters of the square, those two quarters alone must pay for it, yet it shows that one of the cardinal and controlling considerations underlying this whole question is based on the idea that the property benefited by the improvement should bear the expense of it, and that the decision in each case must be governed to some extent by the facts of that case. Nowhere is this made to appear more clearly than in the very case relied upon by counsel for appellee to show that, although the alley improved may lie wholly within two of the quarter squares, yet the cost must be apportioned over all of the four quarter squares.

In the case of *Schmelz v. Giles*, 12 Bush, 491, this court said: "It was the intention of the legislature that each improvement should be made at the cost of each contiguous fourth of a square. The reason for such a rule of assessment is obvious. The effect of its operation is to charge the

cost upon the property which is most benefited by the improvement, and which ought, therefore, in justice, to pay for it. The same principle, we think, not only can but ought to be applied in making assessments for improvements in the interior of the square. The contiguous property is most benefited by the improvement of an alley, and should pay for it, for the same reason that the contiguous property is charged with improving a street."

In that case the alley ran entirely through the square, but did not divide it into equal parts, being about eighty feet closer to the nearest parallel street on the north than to the nearest parallel street on the south. But a most important fact in that case was that although this alley ran for its whole length through only two of the quarter squares, yet every one of the lots in the other two quarter squares, and which fronted on the parallel street from which the alley was more distant, ran back to and abutted on this alley. There they did lie contiguous to the improvement and were benefited by it, and the court properly said in that case that it was just and legal to assess for the cost of that alley back to the parallel streets on either side, although this made one side pay more than the other, for as there was more property abutting on the improvement on that side and which was benefited by it, the owners on that side could afford to pay more.

We can not, therefore, agree with counsel for appellants in their contention that in no case where the improvement lies wholly within two of the quarter squares should the other two be made to contribute towards paying the cost. As seen from the case of *Schmelz v. Giles*, *supra*, it may be eminently just that they should contribute in some instances, as is forcibly illustrated by that case. But the basis of that decision is to a great extent, that the property in all four of

the quarters were equally benefited and, therefore, as said above, the facts in the particular case under consideration must to some extent control the decision of the case.

As we have seen from the decision in *Washle v. Nehan*, *supra*, that there is at least one exception to the rule requiring the costs of these improvements to be apportioned over the whole of the four quarters of the square, so also has this court recognized the fact that the definition of the word "square," which would make it mean every subdivision of territory bounded on all sides by principal streets, is in some cases subject to modifications and exceptions.

It is insisted by counsel for appellants that the subdivision of territory under consideration here is not a square, but is in reality two squares, and it does appear to be a fact that it is in extent about equal to two of the ordinary squares on the north side of Ormsby avenue, or at least that its length from east to west is about double that of the squares on the opposite side of that avenue, and that this arises from the fact that Fifth street, which runs half way between and parallel with Fourth and Sixth streets up to the north side of Ormsby avenue, stops there, and does not therefore divide this territory between Fourth and Sixth streets on the south side of Ormsby avenue as it does on the north side. This explains the anomaly of having Sixth street the next street west of Fourth street at this point, and also explains why this square is double the size of those on the opposite side of the street.

Is this, then, to be considered a square, within the meaning and spirit of that provision of the charter of the city of Louisville which requires the cost of these improvements to be assessed upon all the property embraced in the square within which they are located?

In support of this proposition counsel for appellees relies

upon the case of *Nevin, &c. v. Roach, &c.*, 86 Ky., 492, and it is true that in that case this court upheld and enforced an assessment for improving Chestnut street against the property on the north side thereof, half way back to Walnut street, treating this as a square, although it was much larger than the ordinary square, or than the square on the south side of the improvement, and although another street between Chestnut and Walnut streets was, in fact, dedicated and opened after the ordinance authorizing the improvement of Chestnut street was enacted. But in that case this court expressly held that not every subdivision of territory surrounded by principal streets is a square within the meaning of the charter, and said:

"The square might be of such dimensions as to authorize the conclusion that it was never contemplated that a territory embracing so much land in one square should be deemed a square within the meaning of the law. Such is not the case here."

In that case the square was about seven hundred and forty feet deep, while in this it is, as we have seen, nine hundred feet deep, from east to west, and the court in that opinion has clearly reserved to itself the right of determining both the materiality and the effect of such an increase of dimensions.

And, again, in the case of *Cooper v. Nevin*, 90 Ky., 85, in which the square on one side of the improvement was considerably larger than on the other, and in which this court sustained the assessment to a greater depth on one side than the other, it is said: "Each subdivision of territory bounded on all sides by principal streets is ordinarily deemed a square, and such is the provision of the city charter; still the territory between the streets may be of such dimensions, covering a large area, as would show not only

the necessity, but the certainty, that such an area must at some time be subdivided into squares for public convenience, and, therefore, the city council, in ordering the improvement, will only extend the taxing district as far into the territory that is liable to this subdivision as that taxed on the opposite side of the improvement, where the territory has already been defined by squares surrounded by principal streets, as contemplated by the charter."

Although we fully recognize now, as the court did in that case, the importance of establishing, as far as practicable, and of adhering to, some fixed rule on this subject, even though it may result in hardship in individual cases, yet we are of opinion now, as we were then, that justice demands in some cases that we exercise some discretion in determining what territory is embraced in a square within the meaning of the charter.

In the case before us the square assessed is just double in size the squares on the opposite side of the street, which are of the ordinary dimensions. The square extends from Fourth to Sixth street, with Fifth street opened from the north, but stopping at the northern boundary of this property; and, if extended on southwardly, it would divide this square into two squares of the ordinary size.

The palpable injustice and the gross inequality resulting from this assessment here are so glaring as to emphasize the importance of giving some elasticity to the general rules which we recognize as governing these matters. That this property in the two westwardly quarter squares here can derive no benefit whatever from this improvement, one-half the cost of which it is required to pay, is perfectly apparent. Not only is the whole improvement within the other two quarter squares, but it is in the middle of them, and at a distance from the nearest line of the two western quarter

squares equal to the entire depth to which the property east of the improvement is assessed, and three and a half times that distance from their furthest line. We can not give our sanction to such an injustice.

By apportioning the cost of this alley over the property lying east of a line corresponding with the center of Fifth street, if extended, and which seems to be the center line, running north and south, of the square, a nearer approach to equality will be attained, and the property receiving the benefits be required to pay more nearly its share of the cost, and substantial justice be done.

Wherefore the judgment of the lower court is reversed, and this cause remanded with direction to overrule the demurrer to the answer, and for further proceedings consistent with this opinion.

To a petition for rehearing filed by counsel for appellees, Chief Justice Pryor delivered the following response of the court:

Counsel seems to have misconceived the effect of the opinion in this case. We are not disposed to alter the mode of apportioning the cost of such improvements, but on the contrary to adhere to the well-established doctrine on the subject. In the case of *Schmelz v. Giles*, 12 Bush, 491, the alley improved was so connected with the whole of the lots in the square that every lot bordered upon it. In the case of *Washle v. Nehan*, MS. opinion [97 Ky., 351], this court made the same ruling in substance that has been made in this case.

It appears also that the plat of the territory composing that part of the city in which this alley is located indicates clearly the property liable for the cost of this alley. Fifth street stops on the north side of Ormsby avenue, and if extended would divide this square so as to place the burden

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where the principal opinion says it belongs, and makes that part of the square deriving the sole benefit of the improvement liable to pay for it. This alley does not in fact extend from the one street to the other, and is unlike the case of *Schmelz v. Giles*, where all the lots have access to it.

Petition overruled.

CASE 58—PETITIONS EQUITY—MAY 1.

Long, &c v. City of Louisville.

Sale v. City of Louisville.

Hoskins v. City of Louisville.

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APPEAL FROM JEFFERSON CIRCUIT COURT, CHANCERY DIVISION.

1. **TAXATION—REPEAL OF STATUTES.**—Neither the new constitution nor the charter for cities of the first class passed July 1, 1893, was intended to release taxes assessed under the charter of the city of Louisville theretofore in force, or to destroy any of the existing remedies for their recovery, and therefore, as to all outstanding unpaid taxes assessed and levied by the city of Louisville prior to July 1, 1893, the remedies theretofore provided for their collection and recovery may still be invoked.
2. **RETROSPECTIVE LEGISLATION.**—Neither constitutions nor statutes should be given a retrospective operation unless the language used clearly shows such an intention.

LANE & BURNETT FOR APPELLANTS.

1. The constitution by its own inherent force upon the passage of the act of July 1, 1893, for the government of cities of the first class, repealed an act of May 12, 1884, which provided for the levying and collecting taxes in the city of Louisville and remedies for enforcing same. The act of July, 1893, having failed to preserve and continue in force the provisions of the act thus repealed, actions for the collection of taxes instituted before and pending at the time of the organization of cities of the first class as such under the act of July, 1893, can not be prosecuted. (Sec. 3, Art. 1, Act May, 1884, Vol. 1, Sess. Acts, 1883-4, p. 1261; *Idem*, sec. 1, Art. 4, p. 1274; *Idem*, sec. 7, Art. 4

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p. 1274; *Idem*, sec. 9, art. 4, p. 1280; Sess. Acts, 1885-6, vol. 2, p. 916; sub-secs. 15, 17, sec. 59, secs. 245, 156, 166, 171, 51, 52 of the Constitution; secs. 1, 2, Schedule of the Constitution.

2. It belongs to the legislature alone to prescribe the method and the agencies to be used in the collection of a tax, the conditions upon which they are to be invoked and the limit of their duration, and for the courts to supply any omission in these particulars is an invasion by the judiciary of powers belonging exclusively to the legislative department; therefore, the courts can not in this case supply the remedies which the act of July, 1893, failed to preserve and continue. (*McLean v. Deposit Bank*, 81 Ky., 258; *Jones v. Gibson*, 82 Ky., 563; *Baldwin v. Hewitt*, 88 Ky., 682; *Louisville v. Commonwealth*, 89 Ky., 254; *Thompson, v. Allen County*, 4 Ky., Law Rep., 101; *Dumesnil v. Louisville*, 2 Ky. Law Rep., 431; *Garrett v. Merriweather*, 102 U. S., 501; *Thompson v. Allen Co.*, 115 U. S., 558; *Louisville Trust Co. v. Muhlenberg*, 15 Ky. Law Rep., 397; *Williams v. County*, 35 Maine, 349; *Butler v. Palmer*, 1 Hill, 324; *Commissioners ex parte*, 30 Maine, 221; *Commonwealth v. Cain*, 14 Bush, 536; *Rice v. Wright*, 46 Miss., 682; *In re North Street Canal* 10 Watts, 351; *Stover v. Munnell*, 1 Watts, 248; *Assessors v. Osbourne*, 9 Wallace, 567; *Ex parte McCardle*, 7 Wallace, 514; *South Carolina v. Giffard*, 101 U. S., 433; *Railroad Company v. Grant*, 96 U. S., 401; *Sutherland on Statutory Construction*, sec. 165; *Endlich on Interpretation of Statutes*, sec 479; *Sedgwick on Construction of Statutes and Constitutional Law*, 112; Sess. Acts, 1891-2-3, secs. 194, 210, 219; *Topeka v. Gilett*, 32 Kans., 435; *State v. Smith*, 48 Ohio St., 217; *State v. Pugh*, 43 Ohio St., 112; *State v. Mitchell*, 31 Ohio St., 607; *State v. Constantine*, 42 Ohio St., 444; *Devine v. Cook*, 84 Ill., 592; *State v. Herman*, 75 Mo., 352; *Commonwealth v. Patton*, 88 Pa. St., 260; *State v. Hammer*, 42 N. J. L., 439; *Contieri v. New Brunswick*, 44 N. J. L., 59; *Sutherland on Statutory Construction*, 129; *Board v. Wilson*, 52 Ark., 295; *Watkins v. Eureka*, 49 Ark., 135; *Titusville v. Keystone*. 122 Pa. St., 634; *Board v. Trenton*, 53 N. J. L., 580; *Smails v. White*, 4 Neb., 353; *Todd v. State*, 85 Ala., 341; *Portland v. Stock*, 2 Oregon, 69; *Haring v. State*, 51 N. J. L., 390; *State v. McNeal*, 48 N. J. L., 406; *Blakemore v. Dolan*, 50 Ind., 194; *Varney v. Justice*, 86 Ky., 600.)
3. The constitution of 1891, saved to the city of Louisville all the matters concluded and completed, but it preserved no power, right, jurisdiction or remedy beyond the period fixed by the constitution as the limit of the duration of its charter; hence with the passage and approval of the act of July, 1893, the charter and every act not fully ripened by its completion perished to-

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gether. (Thweatt v. Bank of Hopkinsville, 81 Ky., 1; Speckert v. City of Louisville, 78 Ky., 287; Commonwealth v. Sherman, 85 Ky., 692; Sess. Acts, 1891-2-3, sec. 20, Art. 1, p. 282; City of Louisville v. Johnson, 15 Ky., Law Rep., 617; Commonwealth v. McFerran, 152 Pa. St., 250; State v. O'Niell, 25 Atlantic, 273; City v. Grable, 38 Pa. St., 340; Bangor v. Goding, 35 Maine, 73; Gray v. Carlton, 35 Maine, 482; Kirkpatrick v. New Brunswick, 40 N. J. L., 52; K. C. R. Co. v. Commonwealth, 13 Ky., Law Rep., 484; Dillon on Municipal Corporations, sec. 659; City of Louisville v. Louisville Gas Co., 15 Ky., Law Rep., 178; Ormsby v. City of Louisville, 79 Ky., 202; L. & N. R. Co., v. Hopkins, 87 Ky., 615; K. C. R. Co. v. Pendleton, 8 Ky., Law Rep., 517; L. & N. R. Co. v. Commonwealth, 89 Ky., 538; Camden v. Allen, 2 Dutcher, 399; Belvidere v. Warren, 34 N. J. L., 193; Bryan v. Harvey, 11 Texas, 313; Commonwealth v. Standard, 101 Pa. St., 150; Mount v. State, 6 Blackford, 25; McQuillen v. Doe, 8 Blackford, 583; Dwaris on Statutes, 676; State v. Hill, 70 Miss., 106.)

4. Effect can be given to legislative intent only when it is constitutionally expressed, and when the legislature itself is not inhibited by the constitution.

R. W. WOOLLEY OF COUNSEL ON THE SAME SIDE.

LAF. JOSEPH FOR APPELLEE.

1. The repeal of the old charter of the city of Louisville did not have the effect to repeal the right to sue for taxes assessed and levied under the same, which remained unpaid after the repeal, nor to repeal the jurisdiction of courts in actions brought prior to and pending at the time of the repeal. (Constitution secs. 166, 171, 52, 125, 126.)
2. When the law is altered pending an action the rights of the parties are decided according to the law as it existed when the action was begun, unless the new statute shows a clear intention to vary such rights. (Endlich on Interpretation of Statutes, secs. 228, 271, 520.)
3. Constitutions and statutes should be given a prospective construction unless the language thereof clearly indicates that it shall be retrospective. (Endlich on Interpretation of Statutes, secs. 228, 271, 520; Dash v. VanKleek, 7 John., 503; Pacific & Atlantic Telegraph Co. v. Commonwealth, 66 Pa. St., 70; Cooley on Taxation, 294-7; Cooley's Constitutional Limitations, 77; Slack v. Maysville & Lexington R. Co., 13 B. M., 11.)
4. As provided in sec. 2979 of the Kentucky Statutes, all taxes of cities of the first class "already levied or imposed under ex-

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isting laws and not yet paid remain payable" unless the contrary intention is expressed in the terms of the statute. (Kentucky Statutes, secs. 459, 465, 2979; Schedule of the New Constitution; Meyer on Vested Rights, sec. 1447; Amer. & Eng. Cor. Cases, Vol. 33, 688; City of Louisville v. Johnson, 15 Ky., Law Rep., 615; 15 Ky., Law Rep., 33; Sess. Acts, 1885-6, Vol. 1, p. 916.)

JUDGE GRACE DELIVERED THE OPINION OF THE COURT.

These several causes coming from the Jefferson Circuit Court, and involving the same questions, by consent are heard together.

The main question presented by each appeal is one of taxation by the city of Louisville under authority of the old charter, all arising prior to the act incorporating cities of the first class in Kentucky, passed by the legislature July 1, 1893, the taxes claimed against Long and wife being for the years 1888 and 1889, and against Sale for 1888, 1891 and 1892, and against Hoskins for 1888. Each appeal arising on suits filed in the court below by the city of Louisville against the several parties before named, and judgments having been rendered in each case in favor of the city for the amount of the taxes claimed, the parties severally prosecute their appeals.

The taxes claimed to be due by these several parties defendant in the court below arose for the several years designated, under and by authority given to the city of Louisville by act of the legislature of date May 12, 1884, entitled "An act to revise and amend the tax laws of the city of Louisville." And by it the city of Louisville was invested with the power, and charged with the duty, on the conditions and under the limitations therein set out, of assessing, levying and collecting *ad valorem* taxes at certain rates. This act fixed the maturity of these taxes, provided for interest on them after maturity, secured their payment by a lien on the property assessed, and gave the right to have the

lien enforced by an equitable action, in the event the ministerial remedies for their collection failed. And the original act, and an amendment to same, of date May 1, 1886, provided that in such actions the tax bills authenticated by the *fac simile* signature of the assessor, should be evidence sufficient to make out a *prima facie* case in behalf of the city.

It is conceded by counsel for appellants that the acts of May 12, 1884, and May 11, 1886, authorized the assessment and levy of the taxes sued for, that those acts declared a lien on the property assessed for the payment, and that they allowed interest as claimed, and conferred jurisdiction on the Louisville Chancery Court by suit. The taxes sued for were so assessed and levied under those statutes, and remained unpaid when these suits were filed. The contention of the city of Louisville is that these acts remain in full force and effect as to all taxes assessed and levied prior to the passage of the general act of incorporation of July 1, 1893. While the contention of the appellants is, that on the adoption of this act of 1893, all prior laws pertaining to the city of Louisville authorizing the collection of any taxes past due and unpaid were thereby repealed, and that authority to collect same not being given in the new law, none exists.

Appellants insist first, that it belongs to the legislative department of the government alone to prescribe the method and designate the agencies which may be lawfully invoked for the collection of taxes, even where lawfully assessed and levied, and that it is not within the power or authority of the judicial department to establish and to afford these remedies, where the legislature has failed to do so.

And second, appellants say that these several municipal governments are mere local agencies of the State, from whom they derived all the authority they possess. That with-

out this authority they can do nothing, and that while prior to the adoption of the new constitution of date September 28, 1891, the State might from time to time grant such charters to the several cities in the Commonwealth, and change, alter and amend same at will, yet that after the adoption of the present constitution all such special legislation was prohibited, and that these cities could only be incorporated under general charters, provided for and applicable alike to each city of that particular class, which was by the constitution authorized to be made. And that after the date of the act incorporating cities of the first class applicable at the time only to the city of Louisville, all previous acts of incorporation of every character and kind, including the right to assess, levy and collect taxes past due, were abrogated, annulled and forever destroyed.

And appellants contend further that there being no authority conferred by the new charter of July 1, 1893, for the enforcement and collection of any tax prior to that year, and sued for in these actions, therefore same can not be maintained. That there is now no remedial process known to the constitution and the law for the collection of any tax assessed, levied, due and unpaid prior to July 1, 1893.

Appellants say that this legislative will or authority to so collect has not been given, and can not be implied or exercised by the courts.

Such seems to be the contention of appellants as gathered by an examination of the brief of counsel on file in these suits.

Counsel for appellant have made a most exhaustive examination and collection of authorities in support of their several propositions, and without undertaking to embody same in this opinion or to review specifically each one, we think we may say that much for which appellants contend

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seems to be good law, and amply supported by the authorities cited.

For instance, it is certainly true that the constitution provides by sec. 156, for the division of the several cities and towns of the Commonwealth into six classes, for the purposes of their organization and government. And that the organization and government of each class should be by general laws, so that each municipal corporation of the same class should possess the same powers, and be subject to the same restrictions.

Sec. 166 of the constitution continued in force all previous acts of incorporation of the several cities and towns of the State, until such time as the legislature should make the division into classes, and provide by general laws for the government of same, as in case of city of Louisville, July 1, 1893. And providing that thereupon the former charter and acts of incorporation and amendments thereto should cease, become inoperative and void. This provision, however, as we shall see hereafter, is limited by other provisions, certainly in so far as back taxes are concerned.

Counsel also cites sec. 171 of the constitution as providing that all taxes shall be collected by general laws. This section, however, we apprehend, is prospective only and not retrospective.

Counsel for appellants are doubtless correct in the general proposition that taxes by municipal governments can only be assessed, levied or collected by the special and particular laws granted and passed by the legislature for this purpose.

They are doubtless correct in saying that a tax once authorized, assessed and levied, though remaining uncollected, may be either destroyed, or its collection rendered impossi-

ble, by the repeal of the laws theretofore in force authorizing such assessment, levy and collection.

Counsel are doubtless correct in saying that strictly speaking, and within the line of good authority, taxes are not debts. That they do not lie in any agreement or contract between the citizen and the State, or the municipal authority, but that they are properly speaking imposts laid by authority of the government, as the State, or a city or county. And, further, that in the absence of an express declaration and authority taxes are not a lien on the property assessed, neither do they bear interest after maturity, unless expressly so provided by the legislative authority. Neither does the jurisdiction of courts of equity attach, nor can it be made the medium or authority for the enforcement of any lien, or for the collection of taxes, without express authority. These matters are, however, all dependent on the question as to whether these acts of 1884 and 1886, in so far as they pertain to taxes levied under and by that authority, are still in force.

Counsel for appellants cite sec. 59 of the constitution and the several subsections thereof prohibiting special legislation. This section they commend highly, and seem to apprehend that if their clients are required to pay the taxes sued for, this section will be utterly abrogated and annulled. Counsel reach this conclusion upon the idea that by this act of incorporation of cities of the first class, of date July 1, 1893, all former laws providing for the collection of these taxes were repealed. And that this authority is not given by this act of July, 1893, so that none exists. They say it is but an ineffectual attempt to continue this authority to collect back taxes in the act of 1893, and that because this reference can be only to the city of Louisville, it is prohibited as special legislation.

Quite a number of decisions are cited from other States showing the strictness with which they have upheld and maintained clauses in their several constitutions prohibiting special legislation in all cases where applicable.

We have neither the time to examine these authorities in detail, nor do we know that it would be a profitable employment, for, after all, the questions presented in these cases must be determined by our own constitution and the laws not inconsistent with same.

In reference to our constitution and the act of July 1, 1893, we think we may safely conclude that both were intended by the makers to be prospective, and not retrospective, in their application to the subject of taxation.

This seems to be the general rule of construction or interpretation supported by Mr. Cooley. He says, in his work on taxation, p. 294: "Always construe statutes as prospective and not retrospective, unless constrained to the contrary course by the rigor of the phraseology."

Again, in his work on Constitutional Limitations, p. 77, he says: "We shall venture also to express the opinion that a constitution should operate prospectively only, unless the words employed show a clear intention that it should have a retrospective effect. This is the rule in regard to statutes, and it is one of such obvious convenience and justice that it must always be adhered to in the construction of statutes, unless in cases where there is something on the face of the enactment putting it beyond doubt that the legislature meant it to operate retrospectively. Retrospective legislation, except where designed to cure some formal defect or otherwise operate remedially, is commonly objectionable in principle, and apt to result in injustice. And it is a sound rule of construction which refuses lightly to imply an attempt to enact it.

And we are aware of no reasons applicable to ordinary legislation which do not upon this point apply equally well to constitutions.

On this same line this court held in the case of Slack v. Maysville & Lexington R. Co., 13 B. M., 1, "that principles of justice and general expediency require that the provisions of the new constitution (speaking then of the constitution of 1850) should have a prospective, and not a retrospective, operation, unless otherwise clearly indicated, which is not the case here; and this case is decided on the principles and provisions of the old constitution."

Again Mr. Kent, in the case of Beadleston v. Sprague, 6 Johns, R., 101, says: "This court unhesitatingly acknowledges the principle that a statute is not to be construed so as to work a destruction of a right previously attached. We are to presume, out of respect to the law-giver, that the statute was not intended to operate retrospectively. And if we call our attention to the general sense of mankind on the subject of retrospective laws, it will afford us the best reason to conclude that the legislature did not intend in this case to set so pernicious a precedent."

Considering the cases at bar in the light of the authority and principles just quoted, we stop to inquire upon what principle of justice, law or equity is it that these taxes should not be paid? They are only the same in kind, rate, and amount levied upon all property similarly situated. It is not denied that these several appellants were the owners of the property assessed for the different years, nor was any evidence offered in the court below to show that it was not assessed at its fair value. It may be fairly presumed that all others have paid their taxes for the years indicated. Neither can it be denied that the revenue raised from these taxes goes to the support of the municipal gov-

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ernment of the city of Louisville, to pay its expenses, pay the interest on its outstanding bonds, support its public schools, and other matters of a similar character. Then why, we repeat, should these appellants be excused by the court from contributing their just proportions to the public burden?

What object could the convention that framed our new constitution possibly have had in so framing that instrument as to excuse or exempt these people from the payment of the taxes due for previous years? Or what motive could the legislature in July, 1893, while faithfully endeavoring to carry out and apply the provisions of that constitution to the city of Louisville, have had to so exempt these delinquent tax payers from their just dues for taxes under pre-existing laws?

We do not think it was the purpose of either body to do this thing. Neither do we think they have done so. We think ample provision was made in the constitution itself to guard against any such possible contingency. In fact, by sec. 52 of the constitution it is provided that "the General Assembly shall have no power to release, extinguish, or authorize the releasing or extinguishing, in whole or in part, the indebtedness or liability of any corporation or individual to this Commonwealth, or to any county or municipality thereof."

So, if the legislature could not do this directly, what force has the argument that, by inadvertence and unintentionally in the manner and form of expression used in the charter of cities of the first class (including the city of Louisville), they have destroyed this right to recover the taxes due, under previous laws duly passed?

The provisions of the constitution, which we think modify the sweeping extent of the sections quoted by appel-

lants, and which we think preserve both the taxes and the right to all remedial process for the recovery of same, are as follows, viz.:

The schedule recites:

"That no inconvenience may arise from the alterations and amendments made in this constitution, and in order to carry the same into complete operation, it is hereby declared and ordained:

"*First*: That all laws of this Commonwealth in force at the time of the adoption of this constitution, not inconsistent therewith, shall remain in full force, until altered or repealed by the General Assembly, and all *rights, actions, prosecutions, claims, and contracts of State, counties, individuals, or bodies corporate, not inconsistent therewith, shall continue as valid as if this constitution had not been adopted.* . . .

"*Second*: That all recognizances, obligations and all other instruments entered into or executed before the adoption of this constitution, to the State, or to any city, town, county, or subdivision thereof, and all fines, *taxes, penalties and forfeitures* due or owing to this State, or to any city, town, county, or subdivision thereof; and all writs, prosecutions, *actions and causes of action*, except as otherwise herein provided, shall continue and remain unaffected by the adoption of this constitution."

Reading the provisions of the constitution relied upon by counsel for appellants in the light of these provisions, and reading the act of July 1, 1893, in the same way, we entertain no doubt that it was the purpose of both the convention and the legislature to preserve intact and inviolate the *taxes* due and payable by the property owners of the city of Louisville, prior to the adoption of the constitution, and prior to the passage of the act of July 1, 1893. Recog-

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nizing that there was no good reason, legal or moral, why the appellants should be discharged from taxes then past due and unpaid, and reading both the constitution and the act of July 1, 1893, in the light that they were each intended to be prospective and not retrospective in their operation, we fail to find any provision releasing these taxes, or destroying the remedy theretofore given for their recovery.

When by the first provision of this schedule we read that *all rights, all actions* and all *claims* shall continue and remain as valid as if this constitution had never been adopted, we think these words used might be applied to the right of the city to collect taxes past due and unpaid. And when it says that all *actions* are *preserved*, it embraces and includes actions for the recovery of taxes then authorized to be filed and pending in the Louisville Chancery Court. as well as any and every other action.

And, again, when it says that *all taxes* due and owing to the State, or to any city, town, county or subdivision thereof, shall continue and remain unaffected by the constitution, we conclude there is no escape from this liability.

What matters it to the city or to the individual whether the right of taxation be destroyed, or all remedy for collection of same be taken away. In either event the result would be the same. We fail to find that it was the intention of the convention or the legislature to do either. The declaration "that these taxes shall be and remain unaffected by this constitution" applies as well to the remedy as to the right.

Counsel argue that neither the right of taxation nor the remedy for collection of taxes due and unpaid prior to July 1, 1893, was given by that act. This may be true. Having been fully secured by previous acts of 1884 and 1886, which

are left in full force, it needed no other or *new* authority. The old statute was all sufficient.

The act of July 1, 1893, was chiefly prospective in its operation, and while it need not to have referred to taxes for previous years unpaid, yet it did enact by sec. 194:

"That all taxes already levied or imposed under existing laws, and not yet paid, remain payable, unless the contrary be herein after provided." There was no other provision. If any legislative authority had been needed to continue in force these taxes and the liability of appellants to pay same, this seems full, clear and ample. This section appears in the act incorporating cities of the first class, without any reference to the city of Louisville. True, it doubtless applies to her, being in that class, but by its terms, intent and meaning it would apply equally to other cities, if there were any other, in that class.

And yet appellants would argue that the court must judicially know that there was no other city in Kentucky in the first class than the city of Louisville, and that, therefore, the statute can apply only to the city of Louisville, and hence is obnoxious to the provision of the constitution, sec. 59, against special legislation.

We confess we are not so impressed with the soundness of this reasoning as to apply it in behalf of the delinquent tax-payer, and thus enable him to avoid a legal and moral obligation to bear his just proportion of the public burden.

Some reference is made by counsel as to an ineffectual attempt to perpetuate the rule of *prima facie* evidence attached to the assessor's certificate, as made in this act of July 1, 1893, and in applying same only to the years 1885 and 1886. We have seen that this is immaterial, as this rule of evidence is embodied in the act of May 11, 1886, and is still in force, applicable to the taxes sued for.

And again, some comment is made on sec. 219 as an ineffectual attempt to preserve this right of action. The clause, though carelessly worded, only intended to say that in the collection of taxes theretofore due and unpaid by suits in chancery, where any suit had been theretofore filed (of course it meant under pre-existing laws), and that where yet other taxes might thereafter accrue under this act of July 1, 1893, another suit might be brought to collect same, and that then the court might proceed to hear and give judgment separately or jointly in its discretion. A statute of no special value, yet looking in some degree to the suits already pending as in these cases, at the time of its passage.

We regret the length to which this opinion has extended, but we regard the question presented as being one of general public interest, and apprehend that other suits than these on appeal may be dependent on this decision. And then we desired to notice the chief points made by appellants both under the constitution and the acts of the legislature applicable to the cases under consideration.

Our conclusion is that as to all outstanding, unpaid taxes duly assessed and levied in and by the city of Louisville prior to July 1, 1893, "all rights are reserved."

Wherefore the judgments of the lower court in each of these several appeals, in affirming the validity of the taxes sued for, allowing interest and enforcing the remedies asked for their collection, are affirmed.

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CASE 59—PETITION ORDINARY—MAY 3.

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97	379
97	532
97	379
107	145

APPEAL FROM HARRISON CIRCUIT COURT.

1. **QUALIFICATIONS OF POLICE JUDGES.**—The General Assembly having the power under sec. 160 of the constitution to prescribe the qualifications of all officers of towns and cities, and having provided by sec. 3511 Kentucky Statutes that no person shall be eligible to the office of judge of the police court of a city of the fourth class "unless he be at least twenty-four years of age and has resided within the limits of the city at least six months next preceding his election," a person who possesses these qualifications is eligible to the office of police judge in such a city, although he is not a qualified elector in the city.
2. **ELECTIONS—QUALIFICATIONS OF ELECTORS—MISTAKE IN STATUTE.**—Sec. 3485 Kentucky Statutes, in so far as it provides that the "election" of councilmen and other elective officers of each city of the fourth class shall possess the qualifications of electors prescribed by sec. 145 of the constitution, was not intended to regulate the eligibility of officers, but of electors, it being manifest that the word "election" should be read "electors."
3. **TERMS OF POLICE JUDGES.**—The provision of sec. 167 of the constitution that the terms of police judges "elected" in November, 1893, shall begin September 1, 1894, and continue until the November election, 1897, applies as well to a police judge appointed by the board of council of a city as to one elected by the qualified voters of the city.
4. **SAME.**—Where a police judge was appointed by the board of councilmen in April, 1893, and again in November, 1893, his term of office, by virtue of his first appointment, did not expire until August 31, 1894, and his term of office by virtue of his second appointment did not begin until September 1, 1894; and having died August 3, 1894, there were two vacancies to be filled, one for the term expiring August 31, 1894, and the other for the term beginning September 1, 1894, and the board of councilmen, as they have done, had the power to appoint appellant to fill the vacancy for the short term and appellee to fill the vacancy for the long term.
5. **SAME.**—Notwithstanding a declaration of the board of councilmen in electing appellant that his term would expire at a certain time his term would not then have expired if the constitution had fixed a longer term.

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J. Q. WARD FOR APPELLANT.

1. The appellant possessing the qualifications required by sec. 3511 Kentucky Statutes, passed pursuant to sec. 160 of the constitution, that he should be twenty-four years old and have resided in the city limits six months next preceding the election, he was eligible to the office of police judge. The case of *Atchison, County Judge v. Lucas*, 83 Ky., 451, has no application to this case. (Kentucky Statutes, secs. 3484, 3493, 3509, 3513, 3554.)
2. Sec. 3845 of the Kentucky Statutes was intended to regulate merely the qualifications of electors and not of officers, it being apparent that the word "election" should be read "electors."
3. The term of office which Patterson was elected to in April, 1893, ended with the November election, 1893, and the term to which he was elected or appointed in November, 1893, began at once, to continue until the November election, 1897. The death of Patterson in August, 1894, left, therefore, a vacancy to be filled in the term ending November, 1897, and not in a hold-over term expiring September 1, 1894, as claimed by appellee. (*Johnson v. Wilson*, 15 Ky. Law Rep., 852; Constitution secs. 160, 167; Kentucky Statutes, sec. 3510.)
4. Sec. 3510 of the Kentucky Statutes, passed pursuant to sec. 160 of the constitution, leaving it in the power of the general council of cities of the fourth class to determine whether the police judge should be appointed or elected, conferred no power to fix the term of office, and an ordinance relative to that subject was valid only so far as it fixed the mode of selecting that officer.
5. The board of council had the right under sec. 3551 of the Kentucky Statutes, to fill the vacancy in the office arising upon the death of Patterson by appointing the appellant.
6. As to the construction of the words of sec. 167 of the constitution which follow the word "provided" see—*Debates of the Constitutional Convention*, Vol. 4, pp. 5471, 5713, 5714, 5715; *Trustees of Owensboro v. Webb*, 2 Met., 576; *Old Constitution*, sec. 4, Art. 4; *Charter of City of Paris, Acts 1889-90*, Vol. 1, pp. 989, 991.

WARD & LAFFERTY FOR APPELLEE.

1. The ordinance regulating the election of the police judge provided that the election "should be made in November, 1893, and the term of office to begin September 1, 1894, and continue until the November election, 1897," which was in exact words of

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sec. 167 of the constitution and sec. 3510 of the Kentucky Statutes.

2. Patterson was holding the office from April, 1893, until August 31, 1894, under his election in April, 1893, and upon his death the appointment of the appellant was only for the unexpired term ending August 31, 1894.
3. If the contention of the appellant, that upon the election of Patterson in November, 1893, he entered upon a term to continue until November election, 1897, is true, then he was holding a term of office not provided for at all by the constitution, statutes or city ordinance.
4. The appellant can not claim more than his certificate of election entitles him to, and that under which he holds provides that he "is elected to the office of police judge for the term from the present time to August 31, 1894," thus limiting his term to the last named date.
5. A residence of six months in the city is not sufficient to qualify the appellant to hold the office of police judge without the other and additional qualification of one year's residence within the State. (Constitution, sec. 145; Kentucky Statutes, sec. 3485.)

JUDGE PAYNTER DELIVERED THE OPINION OF THE COURT.

The appellant, S. R. Boyd, filed his petition in the Harrison Circuit Court claiming he was the police judge of the city of Cynthiana, and that the appellee, G. M. Land, was wrongfully holding the office, and asking to have it so adjudged.

A demurrer was sustained to the petition as amended, and appellant failing to plead further his petition was dismissed. The statements of the petition as amended are taken as true in considering this case. By the terms of an amendment (1888) to the charter of Cynthiana the police judge was elected annually in April.

On the first Saturday in April, 1893, Samuel F. Patterson was elected police judge of that city, accepted the office and entered upon the discharge of the duties thereof. By the terms of the act of the General Assembly classifying the towns and cities of the State, Cynthiana is a city of the fourth class.

By the constitutional power possessed by the General Assembly, as construed in *Brown, &c., v. Holland, &c.*, 97 Ky., 249, which it exercised in enacting sec. 3510, Kentucky Statutes, relating to cities of the fourth class, which provides that the judges of police courts in such cities "shall be elected by the people at the general election in November, or appointed by the board of council, as the board may determine by ordinance, enacted at least sixty days previous to any election in November," the board of council of Cynthiana on the 14th day of August, 1893, passed an ordinance providing that the judge of the police court of the city should be appointed by the board of council on the first Tuesday after the first Monday in November, 1893, and every four years thereafter, whose term of office shall begin September 1, 1894, and continue until the November election in 1897, and every four years thereafter the judge of the police court shall be appointed by the board of council, etc."

In pursuance to this ordinance Samuel F. Patterson heretofore named was, on the 7th of November, 1893, appointed judge of the police court of the city of Cynthiana, whose term of office was to begin September 1, 1894.

On the 3d of August, 1894, Patterson died. On the 17th of August, 1894, the board of council appointed appellant Boyd to fill the vacancy in the office of judge of the police court occasioned by Patterson's death, and in the proceedings of the board of council the appellant was declared elected "for the term from the present time to August 31, 1894."

Boyd accepted the office and entered upon the discharge of the duties of it. On September 11, 1894, the board of council appointed the appellee, M. G. Land, judge of the police court. Boyd, under protest, surrendered the books,

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papers, etc., of the office to Land, and then this action followed.

It is contended by counsel for appellee: (1) That the petition did not state facts which show that appellant was eligible to the office. (2) That he was elected to fill a vacancy which ceased August 31, 1894.

On the part of appellant it is insisted by counsel that he was eligible to the office at the time of his appointment; that the term of office by virtue of Patterson's election in April, 1893, ceased upon his appointment in November, 1893, and then his term resulting from that appointment immediately began. This is substantially a correct statement of the issues formed by the contention of counsel.

Sec. 160 of constitution reads as follows:

"The General Assembly shall prescribe the qualifications of all officers of towns and cities, the manner in and causes for which they may be removed from office, and how vacancies in such offices may be filled."

Under the power granted by the constitutional provision just quoted, the General Assembly enacted sec. 3511, Kentucky statutes, which reads as follows:

"No person shall be eligible to the office of judge of the police court unless he be at least twenty-four years of age, and who has resided within the limits of the city at least six months next preceding his election."

It is alleged that Boyd was twenty-four years of age, and had resided within the limits of the city six months next preceding this appointment.

It is argued that the General Assembly could not have intended to declare one eligible to an office in a city in which he is not a qualified elector. The constitution has vested the General Assembly with the authority to say who shall be eligible to hold city offices, and having declared that one

who is twenty-four years of age and who has lived within the limits of the city six months next preceding his election is eligible to the office of judge of the police court, we can not question the wisdom or policy of the General Assembly. We must follow the plain provisions of its enactment and hold from the allegations of the petition, which we take as true, that Boyd was eligible when he was appointed by the board of council.

However, it is contended by counsel for appellee that the amended act of March 24, 1894, which is sec. 3485, Kentucky statutes, prescribes a different qualification for city officers.

The section reads as follows: "The election of councilmen and of other elective officers of each city of this class *shall possess the qualifications of electors* prescribed by sec. 145 of the constitution"

As quoted the language is absolutely senseless and without meaning. We have the word *election* possessing the "*qualifications of electors.*"

If it is read as intended, *electors*, then it makes the paragraph complete and full of meaning. Then the paragraph would read: "The *electors* of councilmen and other elective officers of each city of this class *shall possess the qualifications of electors* prescribed by sec. 145 of the constitution."

The evident meaning of the section is to require the electors who vote for councilmen and other elective officers to have the same qualifications possessed by electors as prescribed by sec. 145 of the constitution, which requires the elector before being entitled to vote to be a male citizen of the United States, twenty-one years of age, to have resided in the State one year and in the county six months, etc.

We do not think that sec. 3485, *supra*, makes any attempt

to regulate the question of eligibility of persons to the office of judge of police court.

Sec. 167 of the constitution reads as follows: "All city and town officers in the State shall be elected or appointed as provided in the charter of each respective town and city, until the general election in November, 1893, and until their successors shall be elected and qualified, at which time the terms of all such officers shall expire."

"*Provided*, That the terms of office of police judges, who were elected for four years at the August election, 1890, shall expire August 31, 1894, and the terms of police judges elected in November, 1893, shall begin September 1, 1894, and continue until the November election 1897, and until their successors are elected and qualified."

Sec. 3510, Kentucky statutes, relates to the office of judges of police courts, and the proviso relating to the terms of such officers is in the exact language of the proviso of sec. 167 of the constitution just quoted.

Part of sec. 167 of the constitution is as follows: "*And the terms of police judges elected in November, 1893, shall begin September 1, 1894, and continue until the November election, 1897.*"

Counsel have not even suggested that the board of council had not the authority to appoint Samuel T. Patterson police judge, on November, 1893. Their authority to do so is conceded by both parties.

Wherein sec. 167 of the constitution refers to the election of police judges in November, 1893, it has reference to those appointed by the board of council of a city as well as those elected by the qualified electors thereof. If we did not so hold then there is no constitutional provision fixing the terms of judges of police courts. Neither the constitutional convention nor the General Assembly intended that there

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should be any difference in the length of the terms of judges of police courts on account of one being elected by the people and the other by a board of council.

If this conclusion be correct then it must be admitted that by the express terms of the constitution the terms of office to which police judges are elected by the electors, or appointed by the board of council in 1893, did not begin until September 1, 1894.

The effect of the provision was to continue Patterson in the office of police judge under his election in April, 1893, until September 1, 1894. He having died on the 3d day of August, 1894, there were two vacancies to be filled—one was the balance of the term, which ended August 31, 1894, and the vacancy for the full term, beginning September 1, 1894, and ending with the November election in 1897.

The fact that Patterson was to succeed himself in the office of judge of the police court made but one vacancy. The two vacancies existed as distinctly as they would have done had A been elected in April, 1893, and B in November, 1893, and both had died on August 3, 1894.

It follows that the board of council had the right to appoint Boyd to fill the vacancy in the term expiring August 31, 1894, which it did do. It likewise had the right to elect Land to fill the vacancy for the entire term to which Patterson had been appointed, beginning September 1, 1894, and ending at the November election, 1897.

We agree with counsel for appellee that if Patterson's term began after his appointment in November, 1893, the board of council electing Boyd to fill the vacancy occasioned by his death had no power to shorten his term of office by declaring that he was elected to hold only until a given time—a term shorter than fixed by the constitution. Holding as we do that the term to which he was appointed in No-

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vember, 1893, did not begin until September 1, 1894, the proceedings of the council were valid in declaring that Boyd was elected to hold the office until August 31, 1894.

It is insisted by counsel for appellant that the case of *Johnson v. Wilson*, 95 Ky., 415, sustains his contention that Patterson's term for which he was elected in April, 1893, expired in November, 1893, by virtue of the general provisions of sec. 167 of the constitution.

This would be true as to any city or town office, except that of judge of the police court, as the provision of that section, as heretofore stated, makes an exception as to that office.

In *Johnson v. Wilson*, *supra*, the controversy was as to the office of treasurer of the city of Lexington, and the court holding that the term of the treasurer, who was elected under the city's old charter on the first Saturday in March, 1892, and duly qualified as such April 14, 1892, for a term of two years, expired in November, 1893.

Had there been a proviso in sec. 167 of the constitution saying that the term of a city treasurer, who was elected in November, 1893, should not begin until September 1, 1894, as it has done as to the terms of judges of the police courts, certainly the court would not have held that the term of the old treasurer expired in November, 1893, and that of the treasurer elected at the November election, 1893, then began.

It seems to us that a mere statement of the facts and the constitutional provision in question demonstrate with certainty that the case of *Johnson v. Wilson* does not sustain counsel's contention.

Judgment affirmed.

Menifee, Committee v. Ends.

CASE 60—APPEAL TO CIRCUIT COURT—MAY 4.

Menifee, Committee v. Ends.

APPEAL FROM LINCOLN CIRCUIT COURT.

1. JURISDICTION OF COUNTY COURT TO APPOINT COMMITTEE FOR IMBECILE—VERDICT OF JURY.—To give the county court jurisdiction to take from a person his estate upon the ground that he is incompetent to manage it, the reason or cause of the infirmity as well as what estate is owned by the subject of the inquest must be made to appear by the verdict. The statute authorizing such a proceeding should be strictly construed and literally followed. The verdict of the jury upon an inquest in the county court to the effect that appellee was "incompetent to take care of of her estate of amount \$2,082.20," and asking that a committee be appointed to take charge of the estate, and the judgment of the county court in conformity to the verdict, were void, and were properly so adjudged by the circuit court.
2. SAME.—The provisions of sec. 2162, Kentucky Statutes, apply only to persons of "unsound mind," and appellee was not found either by the verdict of the jury or the judgment of the court to be a person of unsound mind.

W. H. MILLER, FOR APPELLANT MENIFEE COMMITTEE AND J. S. OWSLEY, JR., COMMONWEALTH'S ATTORNEY.

1. The whole proceeding in the county court was in every respect regular and in strict conformity to the statute, and except as to the selection of the committee not subject to the revision of the circuit court. (Ky. Stats., secs. 2152, 2156, 2157, 2162.)
2. The circuit court had no jurisdiction, and appellant's motion and demurrer should have been sustained. (Ky. Stats., secs. 2149, 2152, 2156.)
3. Even assuming that the circuit court had jurisdiction the affidavit of Thomas Ends is insufficient, and appellant's demurrer thereto should have been sustained. It must *appear* from the affidavit that the inquest was false or fraudulent. (Ky. Stats., sec. 2160.) Formerly a mere *suggestion* of that fact was sufficient. (Gen. Stats., chap. 53, art. 2, sec. 15.) But not so now.
4. Even if the judgment of the county court was void, appellee had no remedy for a recovery of such money and property except by an action by petition and summons. There is no law authorizing the avoidance of a judgment of a court of inferior juris-

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diction by a judgment of a court of superior jurisdiction upon a summary proceeding like this.

R. C. WARREN AND W. G. WELCH FOR APPELLEE.

1. If the Kentucky Statutes gave the county court jurisdiction, by the summary methods and the "snap" judgment disclosed by this record, to deprive the appellee of her property rights, it would be violative of the constitutional guaranty that no one can be deprived of his property except by "due process of law." (74 N. Y., 234.)
2. The statute, however, does not give jurisdiction in this way over this class of cases. This summary method applies only to cases of persons of "unsound mind." (Ky. Stats., secs. 2158, 2162.) When the question of "incompetency" is to be determined a different oath is administered to the jury (Ky. Stats., sec. 2155); and there being no express statutory method of proceeding in this latter case, it seems that the only proper course is to file a petition in chancery, have process served and guardian *ad litem* appointed, etc. (Nailor v. Nailor, 4 Dana, 340; Morton v. Sims, 64 Ga., 298; Shaw v. Dixon, 6 Bush, 645; Mason v. Beazley, 10 Ky. Law Rep., 154.)
3. There is a fatal defect in the county court proceedings in that the jury do not find the reason of the incompetency. (Ky. Stats., sec. 2155.) Besides, they do not find that appellee is incompetent to manage her estate, but merely that she is incompetent to take care of a particular estate—to-wit, \$2,082.20.

JUDGE EASTIN DELIVERED THE OPINION OF THE COURT.

On January 16, 1894, a warrant was issued by the judge of the Lincoln County Court, reciting, among other things, that there had been filed with him, by the county attorney of that county, in the absence of the Commonwealth's attorney of the district, information that Lucy Ann Ends, the appellee, was, by reason of old age, of such imbecile and unsound mind as to render her incompetent to manage her estate. The warrant was addressed to the sheriff, and commanded him to bring appellee into court on the next day, January 17th. that the matter might be inquired into. The writ was executed by the officer, and appellee being in court

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on the day fixed, a jury was impaneled and a verdict returned to the effect that appellee was "incompetent to take care of her estate of amount \$2,082.20," and asking that a committee be appointed to take charge of it.

The county court thereupon entered a judgment in conformity with the verdict, and subsequently appointed appellant as the committee of appellee. It appears that the information on which the warrant was based consisted of an affidavit made by two of the daughters of appellee to the effect that, by reason of old age, their mother was incompetent to manage her estate.

On the 16th day of February, 1894, one Thomas Ends, a son of appellee, produced and filed in the circuit court of Lincoln county, a transcript of the above-mentioned proceedings in the county court, together with his own affidavit, in which he stated, among other things, that appellee was a person of sound mind and perfectly competent to manage her estate, that no suggestion of incompetency on her part had ever been heard of until a very short time before, when she had come into possession of the sum of \$2,492.20, as a pensioner of the United States, and that the inquest and judgment of the county court, adjudging her to be incompetent, were false and fraudulent, and asking that the matter be inquired into. Appellant, being served with process, appeared in this proceeding in the circuit court, and after filing a general demurrer, and a motion to dismiss the proceeding, both of which were overruled, filed an answer on the 7th day of March, 1894. A jury was then impaneled to try the issue, but after hearing the evidence and arguments, and considering the case under the instructions of the court, reported that they could not agree upon a verdict, and were discharged by the court on March 9, 1894.

Appellee then gave notice in writing to appellant that she

would, on the following day, move the court, upon the record of the proceedings in the Lincoln County Court, wherein she had been adjudged to be incompetent to manage her estate, and wherein appellant had been appointed as her committee, to vacate and set aside said orders, and said motion coming on to be heard on March 10, 1894, over the objection of appellant, it was in substance adjudged by the circuit court that the county court acquired no jurisdiction of the matters involved, by the affidavit and warrant referred to, that the verdict of the jury in that court, and the judgment based thereon, were null and void, and that appellant, as committee, should restore to appellee at once all money and property which had come to his hands by virtue of his appointment as such, to all of which appellant excepted and prayed an appeal, which prayer was refused by the court below, but subsequently an appeal from said judgment was granted by the clerk of the court, and the matter is thus brought before us for consideration.

It seems to us unnecessary, in arriving at a correct solution of this controversy, to consider in detail all the objections urged by appellant and appellee respectively against the regularity and validity of the judgments and proceedings in the two lower courts, which are here brought in question, appellee here contending that the action of the county court was null and void, and appellant urging the same thing as against the proceedings in the circuit court. The contention of each side is presented with much force and ability, and it may be true that in neither of the lower courts were the proceedings entirely satisfactory or beyond criticism.

As to the circuit court proceeding, it may be said that it can not be told whether it was conducted as an appeal from the judgment of the county court under sec. 2152, or as an

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original proceeding under sec. 2160, Kentucky Statutes. An appeal bond was executed as though the former proceeding was intended, but still the court, on the statement in the affidavit of Thomas Ends that the county court inquest was false and fraudulent, proceeded to try the question before another jury and to hold a second inquest upon the capacity of appellee, as though proceeding under the other section.

But, however this may be, we are satisfied that the proceedings in the county court were absolutely void, and that the conclusion reached by the circuit court, adjudging them to be of no effect, is the correct conclusion.

Without discussing or deciding the question whether or not the county court warrant, issued upon the affidavit of appellee's daughters, and the inquest held in pursuance thereof, were based and instituted upon the application of the county attorney, within the meaning of sec. 2162, Kentucky Statutes, it is sufficient to say that the provisions of that section apply only to persons of "unsound mind," and that appellee was not found, either by the verdict of the jury or the judgment of the court in that proceeding, to be a person of unsound mind. The verdict of the jury neither found this fact, nor did it find the cause or the reason of appellee's incompetency to manage her estate, as is, in our judgment, clearly demanded by the statute. The judgment of the court entered thereon was equally defective. The verdict was: "We of the jury find that Lucy Ann Ends is incompetent to take care of her estate of amount \$2,082.20, and ask that a committee be appointed to take charge of it." The judgment of the court rendered in pursuance of that verdict, and the only judgment that it justified, was: "It is therefore adjudged that said Lucy Ann Ends is incompetent to

manage her estate which amounts to \$2,082.20, and that a committee should be appointed for her, which is ordered."

The jurisdiction of the courts to assume the care and custody of the estates of persons incompetent to manage their own estates, is limited under the statute to certain classes of incompetents. Sec. 2149, Kentucky Statutes, furnishes the authority invoked in this case and specifies the cases in which it may be exercised. It is true that the warrant issued against appellee charges that she belongs to one of those classes, viz.: that "by reason of old age, she is of such imbecile and unsound mind as to render her incompetent to manage her estate." But, while this was the very question to be inquired into and ascertained by the inquest, the verdict and the judgment are, as we have seen, absolutely silent on this point. As further evidence of the importance of showing within what class the incompetent may come, it is expressly provided by sec. 2155, Kentucky Statutes, with reference to the oath to be administered to the jury on these inquests, that it shall be "in such form as to ascertain *by the verdict* whether such person, by reason of bodily infirmity, disabling him from making his thoughts and desires known, or by reason of any infirmity or weight of age, is incompetent to manage his estate, and also what estate he owns in possession, reversion or remainder, and the value thereof."

It is manifest that the reason or cause of the infirmity must be made to appear "by the verdict," as well as what estate is owned by the subject of the inquest, and in both of these particulars this verdict is fatally defective. So far as it shows, the incompetency in this case might be the result of infancy as well as of old age, or of lack of business experience or other cause, incapacitating and rendering appellee incompetent of managing her estate, and which might or

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might not be embraced within the provisions of the statute giving jurisdiction in such cases.

This statute, like those governing the control and sale of infant's real estate, should be strictly construed and literally followed. It affects the property rights of a large class of unfortunate people who are entitled to know, and to have the jury and the court declare, upon what grounds they are deprived of one of their most sacred and inviolable privileges—the right to manage and control, for themselves and as they may see fit, that which is their own.

For the reasons indicated, the judgment of the Lincoln Circuit Court, adjudging the proceedings of the county court which declared appellee to be incompetent of managing her estate and appointing appellant her committee to be void, and also adjudging that appellant restore to appellee all money and property that came to him as such committee, is affirmed.

CASE 61—PETITIONS EQUITY—MAY 5.

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Reed v. City of Louisville.
Ketchum v. City of Louisville.

APPEALS FROM JEFFERSON CIRCUIT COURT.

1. MUNICIPAL TAXATION—LICENSE TAX.—There is but one general system of assessment as to all property, under the present constitution, for the purposes of government, whether State or municipal, and neither the legislature nor a municipal corporation can classify property for taxation, or substitute a license tax for an *ad valorem* tax. If a license tax is imposed upon a business it must be in addition to, and not in lieu of, an *ad valorem* tax upon the property employed in the business.

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2. A LICENSE TAX within the meaning of the constitution is not a burden on property, but on that which results from its enjoyment, or the conduct of the business or calling.
3. POWERS OF LEGISLATURE AS TO MUNICIPAL TAXATION.—The provision of the constitution prohibiting the legislature from imposing taxes on or for municipalities was not intended to leave the entire mode of assessment to the discretion of the general council, but merely to prohibit the legislature from determining the amount to be imposed and the objects to which it should be applied.
4. IRREGULAR LEVY ORDINANCE.—The omission of the general council of the city of Louisville to impose an *ad valorem* tax for a certain year upon personal property used in any business upon which a license tax was imposed, is not such an irregularity or mistake as renders the entire ordinance void, as the legal part of the levy can be separated from the illegal; and therefore, as the plaintiffs in these cases have been legally taxed they are not entitled to an injunction because of the irregularity. But as the mode of taxation does produce a discrimination against them, a court of equity should grant them relief by requiring the city government to correct the levy ordinance and assess the omitted property. But where the license fees which have been paid are so large as to indicate an intention to embrace the value of the property, they should be credited on the tax bill when collecting on the *ad valorem* system.
5. INJUNCTION.—If this were the case of an assessment for a local improvement, and not a levy for the revenue upon which the maintenance of the city government depends, the wrongful levy or assessment would authorize the interference of the chancellor by injunction.

LANE & BURNETT FOR APPELLANTS.

1. The imposition of a tax upon a trade, occupation or profession can not be made to operate as a tax upon the personal property used in, or as the instrumentality of, such trade, occupation or profession, or have the effect to release such property from *ad valorem* taxation; and it was not competent for the municipal legislature to so provide in the ordinance imposing taxes. (Constitution of Kentucky, secs. 3, 14, 171, 173, 174, 180, 181, 160, 162, 156, 152, 158, 29, 57; Ky. Stats., secs. 2980, 2984, 2985, 3010, 3011, 3012, 3013, 3016, and 3025; *Newton v. Atchison*, 31 Kan., 151; *Exchange Bank v. Hynes*, 3 Ohio St., 15; *City Railway Co. v. City of Louisville*, 4 Bush, 481; *Livingston v. City of Paducah*, 80 Ky., 660; *City of Frankfort v. Gaines*, 88 Ky., 63; *City of*

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- Newport v. South Covington, 89 Ky., 33; Louisville City Railway Co. v. City of Louisville, 4 Bush, 481; Baker v. City of Cincinnati, 11 Ohio St., 534; Glasgow v. Rouse, 43 Mo. 489; Birch v. The Mayor, &c., 42 Ga., 599; Verdeny v. Summerville, 82 Ga., 138; Mayor v. Weed, 84 Ga., 685; Sacramento v. Crocker, 16 Cal., 122; *Ex parte* Jno. B. Robinson, 12 Nev., 263; Louisiana Cotton, etc. v. The City of New Orleans, 31 La. Ann., 447; Lott v. Ross, 38 Ala., 156; Gatling v. Tarborough, 78 N. C., 132; Luntz Case, 6 Me., 414; Cooley on Taxation, pp. 5 and 6; Burroughs on Taxation, p. 154; Desty on Taxation, vol. 1, p. 306; Exchange Bank v. Hynes, 3 Ohio St. pp. 1-66; Zanesville v. Richards, 5 Ohio St., 589; Barbour v. City of Louisville, 6 Ky. Law Rep., 769; Loan Association v. Topeka, 20 Wall, 655.)
2. The provisions of the constitution and of secs. 2980, 2984 and 2985, of the Kentucky Statutes, being mandatory upon cities of the first class, the failure of the appellee to comply with them operated to make void the entire levy of taxes for its fiscal year ending August 31, 1894. (City of Louisville v. Louisville Gas Co., 15 Ky. Law Rep., 178; Ormsby v. City of Louisville, 2 Ky. Law Rep., 66; sec. 79 Ky., 197; City of Louisville v. Cochran, 5 Ky. Law Rep., 833; s. c. 82, Ky., 15; Dumesnil v. City of Louisville, 4 Ky. Law Rep., 14; Slaughter v. City of Louisville, 12 Ky. Law Rep., 61; s. c. 89 Ky., 112; Shanks v. Stephens, 6 Ky. Law Rep., 525; Reamer v. City of Louisville, 6 Ky. Law Rep., 748; Cooley on Taxation, pp. 214, 214; French v. Edwards, 13 Wall, 506; Endlich on Int. of Statutes, sec. 431; Sutherland on Statutory Construction, sec. 454; State v. Brennan, 3 Zab., 509; Howell v. Brissell, 8 Bush, 499; Judge v. Taylor, 8 Bush, 208; Gilman v. Sheboygan, 2 Black, 510; Prim v. Bellville, 59 Ill., 142; Knowlton v. Supervisors, 9 Wis., 410; Weeks v. Milwaukee, 10 Wis., 242; Hersey v. Supervisors, 16 Wis., 185; Smith v. Smith, 19 Wis., 615; Henry v. Chester, 13 Vt., 460; Christy v. Lyon, 37 Cal., 242; People v. McCreary, 34 Cal., 432; Parkland v. Gaines, 89 Ky., 568; Mayor v. Weed, 84 Ga., 683; Verdery v. Summerville, 82 Ga., 138; Chesapeake, etc. v. Miller, 19 W. Va., 408; Cobb v. Elizabeth, 75 N. C., 1; Cheshire v. Commissioners, 118 Mass., 389; Dyer v. Farmington, 70 Me., 515; State v. Cumberland, etc., 40 Md., 22; Bright v. McCullough, 27 Ind., 223; Wilson v. Supervisors, 47 Cal., 91; Fletcher v. Oliver, 25 Kan., 289.)
 3. Appellants are entitled to an injunction to restrain the collection of the illegal tax. (Norman v. Boaz, 85 Ky., 560; Baldwin v. Shine, 84 Ky., 510; Gates v. Barret, 79 Ky., 295; Ky. Stats., sec. 3008.)

PHELPS & THUM AND J. D. REED OF COUNSEL.

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**HUMPHREY & DAVIE, HELM & BRUCE, STONE & SUDDUTH
AND H. S. BARKER FOR APPELLEE.**

1. It has always been found necessary, in municipal taxation, to classify the subjects of taxation, and diversify the mode; so as to suit the different characters of property, and fairly equalize the burden borne by each. The three modes adopted have been, the *ad valorem* tax, which is used to reach real estate and chattels; the system by which the valuation of the property is arrived at by considering its income or product and charging a proportionate tax or "license" thereon—which amounts in effect to a tax on the property itself (*Welton v. Missouri*, 91 U. S., 275); and license-fees on trades and occupations. (*N. O. R. Co. v. Commonwealth*, 81 Ky., 494, 504, 506, 510; *Rankin v. Henderson*, 9 Ky. Law Rep., 861; *Home Ins. Co. v. New York*, 134 U. S., 603; *Railroad Tax Cases*, 115, U. S., 337; *Pacific Express Co. v. Seibert*, 142 U. S. 351.)
2. Unless such classification of subjects, and diversity of modes, of taxation be adopted, uniformity and equality of taxation are rendered impossible. (*Pacific Express Co. v. Seibert*, 142 U. S., 354; *Home Ins. Co. v. New York*, 134, U. S. 603; *Railroad Com. Cases*, 81 Ky., 504, 506, 510.)
3. The new constitution does not render uniformity and equality impossible, by prohibiting such classification and diversity of mode; but, by expressly requiring uniformity and equality, it shows that it intended the classification and diversification to continue, through which alone such equality and uniformity could be obtained. Otherwise it would be repugnant to itself. (*Holzhauser v. City of Newport*, 94 Ky., 407; *Pacific Railroad v. Seibert*, 142 U. S., 351.)
4. Secs. 169, 171, 172 and 174 of the new constitution apply to State taxation only, and not to municipal taxation; which is provided for in sec. 156 to 169 and 181. The varying needs of taxation in the diverse municipalities is wisely left to the legislature and local city governments. (*La. v. Pilsbury*, 105 U. S., 295; *Washington v. The State*, 13 Ark., 752; *Hamilton v. Ft. Wayne*, 40 Ind., 172; *Gilkerson v. Frederick*, 13 Grattan, 579.)
5. Secs. 174 and 182 show that it was intended that "nothing" in the new constitution should be construed as limiting the legislature to the cast iron and necessarily inequitable rule of an *ad valorem* tax on everything; but it was intended to allow the alternative system of taxation based on the product or income of the property, instead of the *ad valorem* method of valuation, when found necessary to secure uniformity and equality. (*Ill. Cent. R. R. v. McLean*, 17 Ill., 291; *Railroad Tax Cases*, 92 U.

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- S., 577; *Sterling v. Higbee*, 134 Ill., 457; *L. & N. R. Co. v. City of Louisville*, 16 Ky. Law Rep., 796.)
6. Sec. 174 will not be construed as authorizing a product tax, or franchise tax or license tax, in addition to, and cumulative to, the *ad valorem* tax; for that would be to authorize double taxation; which is never an allowable construction. (*Livingstone v. City of Paducah*, 80 Ky., 658; *Bamberger, Bloom & Co. v. City of Louisville*, 82 Ky., 343; *Cooley on Taxation*, 2d Edition, 227; *Kimball v. Milford*, 64 N. H., 406; *Revenue v. Gas Company*, 64 Ala., 269; *Coatesville v. Chester*, 97 Pa. St., 476.)
 7. The failure of the assessor to assess all taxable property in the State does not render the assessment void, or warrant one whose property is taxed to avoid paying his own taxes. (*Anderson v. Mayfield*, 93 Ky., 230; *Cooley on Taxation*, 2d Edition, 216; *Watson v. Princeton*, 2 Metcalfe, Mass., 602; *Wilson v. Wheeler*, 55 Vt., 446; *People v. McCrory*, 34 Cal., 432.)
 8. The plaintiff not having "done equity," by paying the taxes really due from him, can not enjoin the city from enforcing those claimed not to be due. (*City of Louisville v. Board of Trade*, 90 Ky., 410; *State v. Railroad Tax Case*, 92 U. S., 576; Ky. Stats., sec. 2983.)

CHIEF JUSTICE PRYOR DELIVERED THE OPINION OF THE COURT.

The appellants, Levi, Reed and Ketchum, are the owners of real estate in the city of Louisville, and decline to pay the taxes on their realty by reason of the discrimination made by the ordinance levying the tax between real and personal estate, applying the *ad valorem* system to the one (realty) and a license tax to the other.

Levi and Reed, two of the appellants, filed a petition seeking an injunction to prevent the collection of tax on their real estate upon the ground that the levy ordinance imposing the license tax on personal property made the entire ordinance or levy void. A demurrer was filed to their petitions by the city, and on the hearing the chancellor adjudged the levy as made unauthorized and invalid, but refused to grant the injunction on the ground that this irregularity in the imposition of the tax, if illegal, afforded no reason for the chancellor's interference.

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The appellant Ketchum filed his action in a different branch of the Jefferson Circuit Court, asking relief on the same grounds assigned by Levi and Reed, and to this petition the appellee (the city of Louisville), instead of demurring filed an answer alleging, in substance, that the burden of taxation had been equalized by the additional tax imposed by the city upon trades, occupations, and professions, and, therefore, nothing was lost to the city, or the burden of taxation on realty increased, by reason of the discrimination made as to the manner only of imposing the burden.

To this answer a demurrer was filed by Ketchum and overruled, and his petition dismissed, and all three of the tax payers have brought the case here for revision.

The relief sought is based on the ground that the ordinance levying this tax is void, for the reason the city council failed and refused to follow the mandate of the constitution, requiring all taxation to be uniform within the territorial limits in which the burden is imposed, and for the still greater reason of their failure to levy an *ad valorem* tax upon the personal as well as the real estate located within the city, and subject to taxation.

It is alleged in the petitions of Levi and Reed that the system adopted by the city of assessing personal property, by imposing upon it a mere license tax, increases the burden upon the realty, and in effect relieves from taxation personal property of the value of fifteen or twenty millions, that under the *ad valorem* system would be required to discharge its portion of the burden.

It is insisted by the city that no provision of the constitution is mandatory as to the mode of assessing personal property for taxation, and that the *ad valorem* system is to be applied alone to the assessment of real estate. That the power to classify property for taxation exists now with

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those authorized to impose the burden, as it did under the former constitution, and, therefore, as to personalty, the substitution of a license tax in lieu of the *ad valorem* system upon the goods, wares and merchandise of the wholesale and retail merchants in the city, as well as other business and associations owning such property liable to taxation, may, by ordinance, be required to pay a license tax upon all their property, except their realty.

It is further contended by the attorney for the city that the provisions of the constitution in relation to the general system of taxation applies only to taxation for State and county purposes, and not to cities of the first class; and that as to the municipal governments of the first class the mode of imposing the tax is left (except as to real estate) to the judgment and discretion of the general council, the latter having the right to apply the *ad valorem* system to the one, and the license tax to the other.

The questions arising in these cases are of the highest importance to both the State and municipal governments, and if the system and mode of assessment of property for taxation is to be followed as it existed under the former organic law of the State, there is then but little difficulty in sustaining the right of the city to substitute as to personalty the license tax, instead of the *ad valorem* system, while, on the other hand, if there has been a fundamental change in the mode of assessment, in ascertaining the value of real and personal property, it must be followed, and the suggestion or argument that the mode adopted differing from the provisions of the organic law will produce the same result, that of uniformity and equality in imposing the burden, can not be permitted to control the decision of this question, even if more just and equal in its results.

The present constitution is more definite and specific in

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its provisions in relation to taxation than our former constitution, and to such an extent as to leave but little for the legislature to do in having them executed. The exercise of legislative power is dispensed with as to the mode of assessment, and the mode of taxation regulated by constitutional enactments that under former constitutions was left to the will of the legislature.

There is but one general system of assessment as to all property, under the present constitution, for the purposes of government, whether State or municipal, and in addition taxation may be based on income, on licenses, and on franchises, and a head or poll tax. The *ad valorem* system relates to the assessment and taxation of all property, the income tax to the product or income from property, or from business pursuits. The license tax is one imposed on the privilege of exercising certain callings, professions, or vocations, that when collected go into the State treasury, and when applied to municipal taxation is termed license fees. A license based on franchises includes the ascertainment of its value, and the mode of determining that value. The power to impose an income tax, a license or franchise tax, is expressly given by the constitution to the legislature, and the exercise of such powers by municipal governments must be derived from legislative enactments, but there is no authority, express or implied, conferred by the constitution on either the State or municipal legislature to substitute a license tax in lieu of the *ad valorem* system. No income tax has been imposed by the legislature, but a license tax has been imposed for State and county purposes, and the power conferred upon municipalities to exact license fees, which is in effect a license tax.

The contention, however, is that the city government, by certain provisions of the constitution, can impose a license

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tax upon personalty, and if legislative authority is required the general provisions of its charter confer such power and it becomes, therefore, necessary to examine the ordinance under which this license tax has been imposed by the city, and the provisions of the organic law from which it is claimed that power is derived, as well as the various sections of the constitution directing the mode of assessment and taxation.

The ordinance relating to the taxes for the fiscal year ending August 31, 1894, is as follows:

"Be it ordained by the general council of the city of Louisville that the following *ad valorem* tax is hereby levied for the fiscal year ending August 31, 1894, on lands and improvements, and on such personalty as is not used and employed in business paying a license tax for such business, and in each case on each \$100 in value, but shall not be levied on any property exempt from taxation." The ordinance then proceeds to enumerate the purposes to which the tax is to be applied, and the rate upon each \$100 in value of property to raise the necessary revenue.

The following sections of the constitution have a direct bearing on the question involved in this case. Sec. 171 provides: "Taxes shall be levied and collected for public purposes only. They shall be uniform upon all property subject to taxation within the territorial limits of the authority levying the tax; and all taxes shall be levied and collected by general laws."

Sec. 172 provides: "All property, not exempted from taxation by the constitution, shall be assessed for taxation at its fair cash value, estimated at the price it would bring at a fair voluntary sale;" and the section then proceeds to impose penalties on those authorized to assess values for a willful neglect of duty.

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Sec. 174 provides: "All property, whether owned by natural persons or corporations, shall be taxed in proportion to its value unless exempted by this constitution; and all corporate property shall pay the same rate of taxation paid by individual property. Nothing in this constitution shall be construed to prevent the General Assembly from providing for taxation based on income, licenses or franchises."

Sec. 181 provides: "The General Assembly shall not impose taxes for the purposes of any county, city, town or other municipal corporation, but may, by general laws, confer on the proper authorities thereof, respectively, the power to assess and collect such taxes. The General Assembly may, by general laws only, provide for the payment of license fees on franchises, stock used for breeding purposes, the various trades, occupations, and professions, or a special or excise tax; and may, by general laws, delegate the power to counties, cities and other municipal corporations to impose and collect license fees on stock used for breeding purposes, on franchises, trades, occupations and professions."

It is argued that from these several provisions of the constitution, and, particularly, secs. 174 and 181, is derived the authority to impose a license tax on the personal estate of those engaged in mercantile or business pursuits, and relieving it from that mode of assessment as to valuation claimed by the appellant to apply to all kinds of property, whether real or personal.

In support of the position taken by the learned judge of the law and equity court, that uniformity and equality in taxation may be reached by a diversity of taxation as to the various kinds of property, reference is made to the constitutions of other States where it has been held under pro-

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visions requiring that all property shall be subject to taxation according to its value, and shall be equal and uniform, that such provisions have been held by the courts of those States to apply to the methods of taxation for the State, and not to municipalities.

The sections of the constitution of Indiana, Virginia, Louisiana and Arkansas, from which the questions originated, are cited, and the cases of *Gilkeson v. Frederick*, 13, Grat. 577; *Washington v. State of Arkansas*, 13 Ark., 752; *Hamilton v. Wayne*, 40 Ind., 491; and *Louisiana v. Pilsbury*, 105, U. S., 278—all well-considered cases—would sustain the contention of the city if the respective constitutions were similar to this State.

In the State of Arkansas the value of property is to be ascertained in such manner as the General Assembly may direct, and the provision of each constitution referred to on this subject confers in express terms upon the legislature the power of prescribing the mode of reaching a just valuation for taxing property, a power that existed with the legislature of this State under the former constitution, because not prohibited, and the exercise of which was not doubted, or when questioned the legislature is sustained by this court. The power to prescribe the mode of assessment, or ascertaining the value of property, has been taken from legislative control and fixed by the constitution, so there is nothing left but to follow its provisions, and no authority is given to the legislature to value or have property valued but in one mode, with the right to impose an income tax, a license tax, and a franchise tax, and if the provisions on the subject of taxation were taken from the constitution and inserted in legislative enactments, it would not be contended that the power to ignore the *ad valorem* system could be abandoned as to personalty, and a license tax substituted.

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Under the former State constitution the right to impose one rate of taxation on one class of property, and a different rate on another class, was well understood, but in considering the provisions of the present constitution, we find the mode of assessment prescribed by that instrument requiring in plain terms *that all property shall be assessed for taxation at its fair cash value estimated at the price it would bring at a fair voluntary sale.* It would do violence not only to the intention of the framers of this instrument, but its letter and spirit, to hold that the system adopted by its provisions could be disregarded and another selected better suited to the business of the municipality, and more just and uniform in its terms. Nor do we find in the constitution a provision of any kind conferring on a municipal government the power to assess property for the purposes of revenue by imposing a license tax, nor has the legislature the power to authorize the imposition of a tax on the assessment of property, whether real or personal, in any other mode than that provided in the organic law.

The power of the legislature to tax a franchise is expressly conferred, and for that reason the mode of determining its value is pointed out by that body; and after creating a board of valuation to value every and all corporations, associations, or companies having or exercising any exclusive privilege or franchise, not allowed by law to natural persons, the power of this board is confined to the invisible estate of the corporation; and its real and tangible property, such as can be seen and valued by the assessor, is required to be omitted, or rather deducted from the value of the franchise, as found by the board, because this species of property is required to be assessed in the county or place where located, or its franchise exercised.

The legislature was careful when adopting a mode of val-

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uing a franchise to omit from its valuation the tangible property, that must, under the provisions of the constitution, be assessed where located, by the State, county or municipal authorities, at its fair cash value, and whether or not this mode is nearer uniformity and equality than the mode contended for is not for this court to determine, nor can these provisions, so plain and unmistakable in their purpose, be made the subject of judicial construction. It must be conceded that if the mode of valuing a franchise had been fixed by the constitution, as is found in the statute, no power would exist with the legislature to adopt any other mode.

If, as contended by counsel for the city, this mode of assessment applies alone to the State, it would be difficult to determine under what provision of the constitution municipal governments derive the power to classify property for taxation, or even to impose taxes for any purpose; nor can it be assumed that in prohibiting the legislature from imposing taxes on or for municipalities the convention intended to leave the entire mode of assessment to the discretion of the general council, and give to such bodies the exercise of a power expressly denied to the representatives of the people.

The object of such a provision as placed the city government beyond legislative control as to imposing taxation was to prohibit the latter body from determining the amount to be imposed, and the objects to which it should be applied.

The words "license tax" imply a burden on that which is not property, but results from its enjoyment, or the conduct of the business or calling, and the legislature assembling after the adoption of the constitution, and composed of some of the leading members of the constitutional convention, understood the meaning attached to the phrase *license*

tax, and under the title of *revenue* and taxation, in subdivision 4 of chap. 109, imposed a *license tax* on certain kinds of business, such as a license on taverns, on retailing spirituous liquors, on saloons, on selling pistols and bowie knives, on ten pin alleys, peddlers, insurance companies, circuses and so on, showing plainly that its imposition as a tax upon property was not even considered. Its meaning is therefore clearly ascertained by its application, as understood by the legislature, and made still more so by the debates in the convention by every member who spoke upon the subject, and still plainer by the provisions of the constitution we are now considering.

The convention doubtless saw, after it had adopted a general system for assessing and taxing property, that the legislature should be clothed with a power that might be required to be exercised in imposing burdens for the exercise of these privileges under the police power of the State, and that such intangible rights as that of franchises and incomes, should be made the subjects of taxation, and therefore provided in sec. 174 that nothing shall be construed to prevent the General Assembly from providing for taxation based on incomes, licenses or franchises, and while this character of tax might be upheld even without express constitutional authority, it was doubtless thought best to be more specific on the subject. The members of the convention had no thought, when annexing to sec. 174 the power to the legislature to impose a license tax, that they were destroying the structure they had already constructed, in regard to the taxation of property, and that constituted the governing feature of taxation in that instrument, and by so doing had delegated the same power to the legislature and municipalities to classify property for taxation as under the former constitution.

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Under the title of Municipal Corporations, sec. 2980, Kentucky Statutes, the legislature, in creating a charter for cities of the first class, provided: "Each city shall raise a revenue from *ad valorem* taxes and a poll tax and license fees, and to that end the common council of each city is hereby authorized and empowered to provide each year by ordinance for the assessment of all real and personal estate within the corporate limits thereof, subject to taxation for State purposes, and shall levy an *ad valorem* tax on same not exceeding the rates and limits prescribed by the constitution, . . . and may impose license fees on stock used for breeding purposes, or on franchises, trades, occupations and professions, and provide for the collection thereof." And in sec. 2984 it is further provided, that the assessor shall assess at its fair cash value, as of the first of September of every year, all the lands, improvements and personalty subject to an *ad valorem* tax under this act. These license fees may be granted as the charter provides for no longer period than one year, *but may be granted for a shorter time*. It is apparent, therefore, that these license fees can not be imposed in lieu of the tax for revenue, as required by law, not only by reason of the provisions of the constitution, but the amount and period for which they may be granted repel such a conclusion.

The framers of the constitution left no discretion with the legislature as to the assessment and valuation of either real or personal property, or as to what property shall be taxed or exempted from taxation, and however wise or unwise the system may be, it is the mandate of the constitution that all must obey. It results, therefore, that the imposition of a license tax upon personalty whether used or not in a business for the exercise of which license fees are paid, or a license tax imposed, is not warranted by the constitution. As

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the judgments in these cases were for the city and all relief denied the tax-payer, it is for this court to determine the remedy they have, if any, and the solution of the question is not free from difficulty. If it involved a question only as to local improvement and an assessment for such a purpose, we would have but little trouble in holding that the constitution did not affect such questions, when the burden is imposed by reason of local benefits, for in such a state of case a wrongful levy or assessment would authorize the interference of the chancellor by injunction, but in these cases the assessment, or rather levy, made by the ordinance is for the revenue upon which the maintenance of the city government depends, and to say to one tax-payer you are not required to pay your taxes under such an ordinance would in effect become a release for all taxpayers, and leave the city without any revenue, or the power to collect it. The chancellor should well hesitate before staying by a judicial order the hands of the tax collector from recovering or collecting these public dues.

This levy ordinance is not, however, void; and while levying an *ad valorem* tax for the fiscal year ending August 31, 1894, on lands and improvements, and on such personalty as is not used and employed in a business not paying a license tax for such a privilege, the general council has omitted to tax the personalty, *ad valorem*, when it is used in a business upon which a license tax has been imposed. It is not such an irregularity or mistake as renders the entire ordinance void, but does produce a discrimination between tax-payers, and is such an immunity from taxation as compels the chancellor to afford the complaining tax-payer some relief, and that relief must consist in the chancellor's requiring the city government to comply, in imposing such a

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burden, with the organic law of the State and the charter creating the municipal government.

The legal part of this levy can be separated from the illegal, and the omission to assess certain personal estate in the proper mode will not render the entire ordinance inoperative. (1 *Desty on Taxation*, 468.) The chancellor has no power to appoint an assessor, or to correct the error, but has the power to compel the city government to do so, in order to remedy the wrong resulting from a mistaken construction by the council of the constitutional provision affecting this question.

The appellants have been legally taxed, and are complaining that the property of others entitled to bear a part of the burden has in effect been exempted, and if the averments of the petition are true, the failure to impose the tax on this personalty must necessarily increase the tax on those who have been compelled to pay on the same kind of property under the *ad valorem* system. Nor is it necessary that the chancellor should be satisfied that such a discrimination exists. The fact that a license tax is imposed on the personalty in the one case, and the *ad valorem* in the others, is sufficient, as when imposed as a part of the license tax it is a violation of the charter of the city as well as the constitution, and it is no answer to say that the one mode is as just as the other.

Mr. Cooley in his work on *Constitutional Limitations*, 5th ed., p. 279, says: "There is and must be an inherent power in every town to bring the money necessary for the purposes of its creation into the treasury, and if its course is obstructed by ignorance or mistakes of its agents, they may proceed to enforce the end and object by correcting the means."

The existence of the municipality itself depending upon

the collection of this revenue, the chancellor should require such steps to be taken by the council to collect this tax as if the ordinance had been without error in the first place. That is, the council should amend the ordinance and have this property assessed, applying the *ad valorem* system as of the date at which the property under the ordinance was required to be assessed.

The chancellor can not, it is true, lessen the amount of tax levied by the ordinance by reason of the future collection of tax from this omitted personal property, but it must be assessed and taxed, the taxes when collected forming a part of the revenue of the city, and redounding to the benefit of all the tax-payers.

The chancellor has properly refused to grant the injunction, but to say that such a taxation can be imposed and no relief granted would be to sanction not only an unjust discrimination but a plain violation of the constitution, and no remedy offered.

A court of equity, under such circumstances, must afford some relief, and we perceive no reason why this omitted property should not be required to pay this tax.

The charter of the city, in order to provide against such mistakes or omissions on the part of the general council, and to correct such errors, provides: "If any year the general council shall fail to pass a levy ordinance, or if the levy ordinance in any year shall be invalid or inoperative, the rate of taxation for that fiscal year shall be the same as it was the year before, item for item."

While that section of the charter may apply as to the rate of taxation, there must be difficulty in proceeding under it without an assessment. The rate of tax is fixed, and the property omitted from taxation assessed by correcting the levy ordinance, and then with the proper assessment the

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tax may be collected. While license fees can not be imposed so as to embrace the value of property, and the amount to be imposed is with the council, where this has been done in such a state of case the council should be directed to credit the amount paid; if any, on the tax bill, when collecting on the *ad valorem* system. This suggestion is made in view of the fact that some of the license fees authorized to be imposed, as appears from the statute, indicate an amount approximating values, and if so, the sum should be deducted from the tax bill, and of this the council must be the judge.

The city being the defendant its common council should be required to correct the levy ordinance, and to have assessed the personal property (omitted from the *ad valorem* system) existing at the date of the assessment under the ordinance in which the error was committed, its value to be ascertained as of the date at which the original assessment was required to be made.

This mandate is based on the idea that no steps have been taken to correct the error of the council.

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CASE 62—MOTIONS—MAY 8.

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Hindman, &c v. Field.

1. **ELECTION OF SPECIAL JUDGE.**—There are only two conditions in which the statute authorizes election of a special judge in either of the three branches of the Jefferson Circuit Court having jurisdiction of civil cases. The first is where a case has been once transferred, and the presiding judge of the branch to which the transfer is made can not sit. The other is where from any cause the presiding judge fails to attend; but not even in that case can there be a special judge if the judge of any other branch attends and holds the court for the occasion. Though, of course, it was contemplated continuous absence of a regular judge would render election of a special judge necessary.
2. **TRANSFER OF SUITS FROM ONE BRANCH OF JEFFERSON CIRCUIT COURT TO ANOTHER.**—One who had been duly elected special judge of the chancery branch of the Jefferson Circuit Court, having the powers of a circuit judge, might have requested the judge presiding over another branch of the Jefferson Circuit Court to hear and determine a case in which he could not sit, or any question arising in it; or he might have caused to be made an entry of record of his disability to preside, which would have amounted to authority to the clerk to determine by lot to which of the other two branches having jurisdiction of civil actions it should be transferred. But an order made by him transferring the action directly to the common pleas branch was not void, and the action having been put upon the docket of that branch the judge thereof might have proceeded to hear and determine it, and any questions connected therewith, and such proceeding would have been valid. But whether the order of transfer made by the special judge of the chancery branch was valid or not the question was entirely within province of the judge of the common pleas branch, and it was for him alone to decide how the case should be disposed of. Therefore a peremptory order made by the judge of the law and equity branch directing the clerk to immediately determine by lot to which of the two branches the case should be transferred was void, and the assignment of the case to that branch under that order conferred upon it no jurisdiction.
3. **SAME.**—Even if the order of the law and equity branch was not void the mode adopted by the clerk of determining to which of

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the two branches the case should be transferred was improper, even according to rule 19 of the court, which authorized determination by lot of the single question to which court that particular action was to be transferred, without regard to assignment of other cases.

4. POWER OF COURT OF APPEALS TO ISSUE WRITS OF PROHIBITION AND MANDAMUS.—Sec. 110 of the present constitution gives to the Court of Appeals plenary power to issue writs in every case where necessary to give it control of inferior jurisdictions. And while this court having discretion ought not generally to issue writs of prohibition when adequate relief can be afforded by exercise of its revisory power, yet as this is a case where one branch of the Jefferson Circuit Court is attempting by mandamus to compel the clerk to determine by lot what disposition shall be made of an action on the docket, and subject to orders, of another branch, the writ is granted.
5. THE MOTION FOR MANDAMUS against the judge of the common pleas branch is denied because he may at his election hear and and try the action, or by order require the clerk to determine by lot to which branch it is to be transferred, one or the other of which steps it is his duty to take.

PHELPS & THUM FOR PETITIONERS.

1. The rule upon which defendants rely is void. It provides for an allotment between the three divisions other than that in which the case is pending, thus including the criminal division, to which no civil case can be transferred. (*Mengel, Jr. v. Jackson*, 94 Ky.)
2. The fact that Judge Abbott was attorney for one of the claimants in the case was no reason why he could not make an order transferring the case. (Ky. Stats., secs. 1027, 1030; *Royal Ins. Co. v. Rufer's Admrs.*, 89 Ky., 512.)
3. This court in aid of its appellate jurisdiction has power to grant a mandamus compelling the judge of the lower court to try the case. (Const. of Ky., sec. 110; *Vance v. Feld*, 89 Ky., 178; *Lowe v. Phillips*, 14 Bush, 144; *Barnett v. Warren Circuit Court*, Hardin, 173; *Sanders v. Nelson Circuit Court*, Hardin, 17; *Riggs v. Jackson*, 6 Wall., 166; *Marbury v. Madison*, 1 Cranch, 137; *United States v. Boutwell*, 17 Wall., 604; *Ex parte Burtis*, 103 U. S., 238; *U. S. v. Lawrence*, 3 Dall., 42; *U. S. v. Peters*, 5 Cranch, 115; *Life and Fire Ins. Co. of N. Y. v. Wilson*, 8 Pet., 291; *Kendall v. United States*, 12 Pet., 524; *Decatur v. Paulding*, 14 Pet., 597; *U. S. v. Fraser*, 22 How., 174; *Ex parte Milwaukee R. Co.*,

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5 Wall, 188; *Ex parte* Newman, 14 Wall, 152; *Ex parte* Loving, 94 U. S., 418; *Ex parte* Flippin, 94 U. S., 348; *Ex parte* Gorman 114 U. S., 174; Daniel v. Register of Land Office, Sneed, 218; Cases cited in Preston v. Fidelity Trust & Safety Vault Co., 94 Ky., 298.)

HELM & BRUCE AND GRUBBS & MORANCY FOR DEFENDANTS.

1. Where a special judge of one of the divisions of the Jefferson Circuit Court is interested in a case he has no power to make an order transferring the case to one of the other divisions, and thus select the judge who shall try his case. He must simply note his disqualification of record, and then let the clerk make the distribution of the case by lot as provided by rule 19 of the court. (Const. of Ky., secs. 136, 137; Ky. Stats., secs. 1029, 968, 1030, 1027, 1034.)
2. While Rule 19 of the court is inoperative as to the criminal division, it may be enforced as to the other two divisions.

JUDGE LEWIS DELIVERED THE OPINION OF THE COURT.

There had, prior to April 11, 1895, been duly assigned to the chancery branch of the Jefferson Circuit Court the pending action of S. S. Sullivan, assignee, against Columbian Fire Insurance Company and others. But on that day W. R. Abbott, elected special judge and presiding in place of I. W. Edwards, regular judge, who was sick and unable to attend, made and caused entered of record an order transferring that action to the common pleas branch, because, as stated in the order, he was employed as attorney for one of the defendants, and therefore could not properly preside.

At a court held for Jefferson Circuit Court, common pleas branch, April 13, 1895, Hindman and others, defendants, moved the court to pass on and decide as to certain exceptions and certified matters in the case necessary to be decided. But no action was then taken or order made.

Again, April 29, 1895, they appeared and, notice having been given, moved the court to assign to a day hearing of pending motions. But Emmet Field, judge of the Jefferson

Circuit Court, common pleas branch, then, as recited, "declined to consider the motion or any other motion herein, or to take any action in this case."

It further appears that April 27, 1895, the plaintiff in the action filed in the Jefferson Circuit Court, law and equity branch, of which S. B. Toney is judge, his petition, and moved the court for an order upon John S. Cain, clerk, to determine by lot whether the action should be assigned to law and equity or common pleas branch. Thereupon the judge, first overruling demurrer to the petition filed by Cain, peremptorily ordered him to so determine by lot to which of the two branches the action should be assigned. And on the same day he did, in the mode hereinafter described, determine the action should be assigned to law and equity branch.

Now there are before this court two petitions filed April 30, 1895, in one of which we are asked to issue a writ of prohibition forbidding S. B. Toney, judge of law and equity branch of the Jefferson Circuit Court, to try said action, or to make any orders therein; and in the other we are asked to issue a writ of mandamus requiring Emmet Field, judge of common pleas branch, to proceed and try the pending motions, and ultimately the action.

It is contended by plaintiffs in this proceeding, defendants below, that W. R. Abbott, having been by statute invested, as special judge, with all powers of the regular judge, was authorized to make the order transferring the action to the common pleas branch, which thereby acquired complete and exclusive jurisdiction. Defendant here, plaintiff below, contends that according to rule 19, adopted by the four judges in general term, as they were authorized by statute to do, W. R. Abbott as special judge was required, and had power, to do no more than cause the fact that he could not properly preside in the action to be noted of record; and that being

done, duty devolved upon the clerk to determine by lot to which of the other two branches having jurisdiction of civil actions it should be assigned.

Sec. 970, Kentucky Statutes, provides generally that if the person first elected to act as special judge of a circuit court fails or refuses to act, or can not properly preside, another election shall be held in like manner from time to time until a suitable person is chosen who can and will preside. But evidently that section does not apply to a court like the Jefferson Circuit Court, composed, in virtue of the constitution as well as statute, of four judges.

Sec. 1025, being part of sub-division 4, chap. 35, title of which is "Courts having Four Judges," provides that litigation prosecuted in branches other than the criminal branch shall be divided between them according to rules of court to be made in general term, and prescribes the particular mode by which actions are to be assigned to the several branches in case such rules are not, or until they are adopted. The action was, according to rule 1, which is substantially like the statutory mode, first assigned to the chancery branch, and there is no question of it having been properly done.

Sec. 1027 also authorizes rules made in general term for transfer of causes or issues, except criminal causes, from one branch to another, where by reason of the nature of the cause or issue, or disability of the judge of the branch to which it had been originally assigned, such transfer may be proper.

It is, however, further provided that in causes which have been once transferred, if the presiding judge can not sit a special judge shall be chosen by the attorneys of the court in attendance not interested, nor of counsel, to preside.

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Sec. 1028 is as follows: "*No proceedings in such court shall be invalid because prosecuted in the wrong branch thereof.*"

Sec. 1029 provides that when for any cause the judge presiding over any branch of such court fails to attend, the judge presiding over any other branch may attend and hold said court for the occasion; but if he does not attend the attorneys of said court in attendance thereon shall elect one of their number to hold court for the occasion. And sec. 1030 contains a further provision, that any judge presiding over one branch may, upon request of a judge presiding over another branch, hear and determine any case or question in such other branch pending; the request being entered on the order book of that branch where the case or question is pending.

It will be observed there are only two conditions in which the statute authorizes election of a special judge in either of the three branches having jurisdiction of civil cases. The first is, where a case has been once transferred, and the presiding judge of the branch to which the transfer is made can not sit. The other is where from any cause the presiding judge fails to attend; but not even in that condition can there be a special judge if the judge of any other branch attends and holds the court for the occasion. Though, of course, it was contemplated continuous absence of a regular judge would render election of a special judge necessary.

W. R. Abbott having been duly elected special judge of the chancery branch, and having the powers of a circuit judge, might, as authorized by sec. 1030, have requested the judge presiding over another branch of the Jefferson Circuit Court to hear and determine the case under consideration, or any question arising in it; or he might have caused made entry of record of his disability to preside, which would have amounted to authority of the clerk to determine by

lot to which of the other two branches having jurisdiction of civil actions it should be transferred. But, instead, he made an order transferring the action directly to the common pleas branch.

That order was not however void or ineffectual; for the action having in virtue of it been put on the docket of the common pleas branch, the judge thereof might have proceeded to hear and determine it, and any questions connected therewith; and as expressly provided by sec. 1028 such proceeding would have been valid. But whether the order of transfer made by Special Judge Abbott was noted or not, the question was entirely within province of the judge of common pleas branch, and it was for him alone to decide how the case should be disposed of. It thus results that the action of the judge of the law and equity branch, in peremptorily ordering the clerk to immediately determine by lot to which of the two branches the case should be transferred, was unauthorized and void. For the clerk was thereby forced to act not merely in disregard of the order of Special Judge Abbott, but while the case was on the docket of the common pleas branch, and before the judge thereof had determined whether he would hear and decide the pending motions.

Moreover, the mode adopted by the clerk of determining to which of the two branches the case should be transferred was improper, even according to rule 19, which authorized determination by lot of the single question to which court that particular action was to be transferred, without regard to assignment of other cases.

In our opinion, therefore, transfer of the case to the law and equity court, in the manner attempted, is invalid, and for that court to hear and determine the case, in pursuance of such abortive transfer, would be not merely illegal, but a

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precedent leading to confusion and conflict between the different branches of the Jefferson Circuit Court, seriously prejudicing litigants.

Sec. 110 of the constitution provides that the Court of Appeals "shall have power to issue such writs as may be necessary to give it a general control of inferior jurisdictions."

It was held prior to adoption of the present constitution, that there could be a proceeding in this court for prohibition only in a case in which, in the exercise of appellate jurisdiction, it has the power of controlling the inferior court by a direct revision of its judicial acts. And it was further held that a writ of prohibition is not an appropriate proceeding in a court of merely appellate jurisdiction, inasmuch as the revisory power of such a court can afford adequate relief without a resort to a proceeding of that character. (*Arnold, &c., v. Shields*, 5 Dana, 18; *Sasseen v. Hammond*, 18 B. Mon., 672.) But it seems to have been intended by the clause of the constitution quoted, which was not in the old constitution, to give to the Court of Appeals plenary power to issue writs in every case when necessary to give it general control of inferior jurisdictions. But while this court having discretion ought not generally to issue writs of prohibition, when adequate relief can be afforded by exercise of its revisory power, the case before us is one requiring it. For it is the case of one branch of the Jefferson Circuit Court attempting by a mandamus to compel the clerk to determine by lot how an action on the docket and subject to orders of another branch shall be disposed of. And if the judge of the common pleas court had entertained and passed upon the motions pending before him, as he then had the exclusive power to do, a conflict would have occurred, rendering intervention of this court imperative.

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Wherefore the motion for writ of prohibition is sustained, and the judge of the law and equity branch of the Jefferson Circuit Court is prohibited taking jurisdiction of or passing upon any motions connected with the action of S. S. Sullivan, assignee, plaintiff, against Columbian Fire Insurance Company and others, defendants, until and unless the clerk shall, under order of the common pleas branch of said court, determine by lot the transfer of the case to the first named branch.

The motion for mandamus against the judge of common pleas branch of said court is denied, because he may, at his election, hear and try the action, or by order require the clerk to determine by lot to which branch it is to be transferred, one or other of which steps it is his duty to take.

CASE 63—PETITION ORDINARY—MAY 9.**Koestel v. Cunningham.****APPEAL FROM JEFFERSON CIRCUIT COURT, COMMON PLEAS DIVISION.**

1. **LIABILITY FOR INJURY DONE BY VICIOUS DOG—PUNITIVE DAMAGES.**—The owner of a dog is liable under the statute (Ky. Stats., sec. 68), for compensatory damages to any person who is bitten by the dog; and the jury may give punitive damages if the owner had knowledge of the fact, prior to the injury, that the dog was vicious toward persons.
2. **SAME.**—The general rule in tort actions is that if the defendant act maliciously, wilfully, or with such gross negligence as to indicate a wanton disregard of the rights of others, the jury may award punitive damages.
3. **SAME.**—The jury had enough evidence before them in this case to conclude that the defendant had knowledge prior to plaintiff's injury of the vicious nature of his dog, although there was no direct proof of such knowledge on his part.

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KOHNS, BAIRD & SPINDLE FOR APPELLANT.

1. The trial court erred in refusing to submit to the jury the issue as to whether the appellee was bitten by the appellant's dog. (Keightlinger v. Egan, 65 Ill., 236.)
2. The court erred in admitting evidence tending to prove that the dog was vicious, and in submitting to the jury the question of punitive damages on the idea that the dog was vicious and known to be such by the appellant. (Wood on Nuisances, vol. 2, sec. 678; Hartly v. Harriman, 2 B. & Ald., 620; Judge v. Cox, 1 Starkie, 227; Murray v. Young, 12 Bush, 337; Laherty v. Hogan, 13 Daly, 533; Gossman v. Badgett, 6 Bush, 101.)

WILLSON & THUM AND W. W. THUM FOR APPELLEE.

1. The evidence showed that the appellee was bitten by the appellant's dog in the public street, and that the dog was a notoriously dangerous one, known to be so by appellant, thus entitling appellee to recover damages. (General Statutes, p. 225, sec. 10.)
2. The question of whether the appellee was bitten by the appellant's dog was submitted to the court in the words of instruction that "if the jury shall believe from the evidence that the plaintiff was bitten by defendant's dog" they should find for plaintiff.
3. The appellant can not complain that the court permitted appellee to prove that the dog was fierce and dangerous to mankind without an allegation that he was fierce and dangerous, since such an allegation in their petition was stricken out on motion of the appellant.
4. The allegations of the petition that the dog was dangerous to persons, and that defendant knew it and permitted it to run at large, presented a case in which punitive damages might be assessed.

JUDGE HAZELRIGG DELIVERED THE OPINION OF THE COURT.

Cunningham recovered of Koestel a judgment for \$500 in damages by reason of injuries inflicted on him by the bite of the latter's dog.

For the appellant it is insisted that the instructions given on the trial are erroneous, chiefly because they submitted the question of punitive damages to the jury. The verdict does not appear to exceed the actual damages of the plain-

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tiff under the proof, but if it did we should not regard it as invalid.

The general rule in tort actions is that if the defendant act maliciously, wilfully, or with such gross negligence as to indicate a wanton disregard of the rights of others, the jury are not confined to an assessment of compensatory damages only.

The first sections of the chief instruction permit damages, provided the jury believe from the evidence that the plaintiff was bitten by the defendant's dog, for loss of time, doctors' bills, etc. And the last sections allow punitive damages if the jury should believe from the evidence "that the defendant's dog at the time he bit the plaintiff, if he did bite him, was of a fierce or dangerous disposition towards persons, and was liable to attack and injure a person, and the defendant theretofore, that is, before the first day of August, 1892, had knowledge of that fact."

We think the instruction was proper. At the common law the dog was regarded as a tame, harmless and docile animal, and its owner not responsible for any vicious or mischievous act it might do, unless he had a previous knowledge of its mischievous or vicious propensities.

As an English judge put it, "the dog was entitled to his first bite." The statute, however, enlarges this responsibility and "every person owning, having or keeping any dog shall be liable to the party injured for all damages done by such dog." (Ky. Stat., sec. 68.)

The proof establishes overwhelmingly that the defendant's dog bit the plaintiff while he was in no way provoking him, when the plaintiff casually passing along the public street was unaware of the impending attack. It also conduced to show that the animal was vicious towards persons, and had so been for a considerable length of time prior to

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the occurrence in question. The defendant's knowledge of this feature of his dog's nature was not shown by any direct proof, but circumstances were put in evidence conducing to show that he must have been aware of it. The jury had enough evidence before them on that question to so conclude. His wife certainly knew of it.

It is elaborately argued by counsel that the instruction did not submit to the jury the question whether it was the dog of the defendant that bit the plaintiff, but assumed such state of case. We think otherwise. The language is clear and emphatic on that point.

Judgment affirmed.

CASE 64—PETITION ORDINARY—MAY 9.

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APPEAL FROM JEFFERSON CIRCUIT COURT, COMMON PLEAS DIVISION.

1. CARRIERS—CARE REQUIRED IN OPERATION OF PASSENGER ELEVATOR.—The owner and manager of an elevator for passengers is to be treated as a public carrier of passengers, and is subject to the same responsibilities as a railway passenger carrier. Therefore the law holds him to the utmost diligence and care of very cautious persons, and responsible for the slightest neglect.

In this action against a hotel company to recover damages for injuries to plaintiff (a boy under seven years of age) while riding in defendant's elevator, the court properly instructed the jury that "it was the duty of defendant to exercise the highest degree of care and skill usually exercised by prudent persons in the same business, in the management and operation of the elevator in which plaintiff was riding at the time he was injured," and further that if they believed that the defendant failed to exercise that degree of care in the selection of its agents to run the elevator, or that its agents or servants, whether competent or not, failed to exercise that degree of care in the management of the elevator, the law was for plaintiff.

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2. SAME—INSTRUCTIONS AS TO CONTRIBUTORY NEGLIGENCE.—The court after instructing the jury as to contributory negligence properly instructed them that they "ought not to find plaintiff contributed by negligence to cause his injury unless they shall believe from the evidence that he failed to exercise that degree of care for his own safety which ordinarily careful and prudent children of his age, -experience and discretion are accustomed to observe under same or similar circumstances."
3. VERDICT SUPPORTED BY EVIDENCE.—The jury having under such instructions found for plaintiff, thus in effect finding that it was negligence in those operating the elevator to permit plaintiff to sit in front of the door of the elevator and so close as that in turning round at the call of one of the two boys operating the elevator his foot and leg were caught and crushed, that finding will not be disturbed.
4. A VERDICT FOR DEFENDANT UPON A FORMER TRIAL WAS PROPERLY SET ASIDE because of error of the court in failing to define the degree of care, skill and diligence necessary to be used in operating an elevator.
5. EXCESSIVE VERDICT.—A verdict for \$500.00 was not excessive, the plaintiff's general health being impaired by his injuries.

BULLITT & SHEILD AND O'NEAL, PHELPS, PRYOR & SELLIGMAN FOR APPELLANT.

1. The court erred in setting aside the first verdict. The instructions under which that verdict was returned presented the law correctly. Besides, defendant was entitled to a peremptory instruction.
2. The court erred upon the second trial in admitting the testimony of Mrs. Camp as to what was said to her by Frank Jackson. These declarations formed no part of the *res gestae*. (Ky. Cent. Ry. Co. v. Fox, 10 Ky. Law Rep., 399; Ryan v. Gilmer, 4 Ky. Law Rep., 151; Luby v. Hudson River Co., 17 N. Y., 131; Bellefontaine R'y Co. v. Hunter, 33 Ind., 335; s. c. 5 Am. Rep., 201; Lane v. Bryan, 69 Am. Dec., 282; Patterson v. Wabash & C. R. Co., 57 Mich., 91; Williamson v. Cambridge & C. Co., 144 Mass., 148; Adams v. Hannibal R. Co., 74 Mo., 553; s. c. 41 Am. Rep., 333.)
3. The court erred in instructing the jury that it was the duty of the defendant to exercise the *highest* degree of care and skill usually exercised by prudent persons in the same business.
4. *This was* a case for peremptory instruction. When the facts are undisputed, and there can be but one conclusion drawn by reasonable men, then the law is for the court. (Stout v. Railroad Co., 17 Wall, 657; Needham v. L. & N. R. Co., 85 Ky., 423.)

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5. Unless some duty can be thrown upon the company to absolutely insure the safety of the plaintiff there is no liability. (*Miles v. Receivers*, 4 *Hughes*, 172; *Gladman v. Railroad Co.*, 15 *Wall*, 408.)

J. T. A. BAKER, R. C. DAVIS AND MATT O'DOHERTY FOR APPELLEE.

1. The court properly refused a peremptory instruction. (*Thompson v. Thompson*, 17 *B. Mon.*, 29; *United Society of Shakers*, 11 *Bush*, 276; *Shay v. Richmond, etc., Turnpike Road Co.*, 1 *Bush*, 109; *Stephens v. Brooks*, 2 *Bush*, 137; *Buford v. L. & N. R. Co.*, 82 *Ky.*, 286.)
2. This court will not reverse on account of the action of the lower court in granting a new trial unless there has been a flagrant abuse of discretion. (*L. & N. R. Co. v. Condiff's Admr.*, 16 *Ky. Law Rep.*, 296; *Chesapeake &c. R. Co. v. Hickey*, 15 *Ky. Law Rep.*, 112; *Caldwell v. Wright*, 8 *B. Mon.*, 526; *Ewing v. Price*, 3 *J. J. Mar.*, 523.)
3. The duty defendant owed to plaintiff on the elevator was that of a public carrier of passengers, and he was bound to the highest degree of care. (*Ray on Negligence of Imposed Duties, Passenger Carriers*, pp. 2, 308; *Goodsell v. Taylor*, 42 *N. W. Rep.*, 873; *Treadwell v. Whittier*, 80 *Cal.*, 574; *Central Passenger Ry. Co. v. Bishop*, 9 *Ky. Law Rep.*, 348; *Louisville City Ry. Co. v. Weams*, 80 *Ky.*, 422.)
4. The declaration of Frank Jackson, elevator boy, made almost simultaneously with the accident, was competent as a part of the *res gestae*. (*Ky. Cent. R. Co. v. Fox*, 10 *Ky. Law Rep.*, 399; *Hanks' Admrs. v. Louisville & Cincinnati Mail Line*, 6 *Ky. Law Rep.*, 294; *Insurance Company v. Moseley*, 8 *Wall*, 397; *Harriman v. Stone*, 57 *Mo.*, 93; *Commonwealth v. McPike*, 3 *Cush.*, 181; *McLeod, Receiver v. Ginther's Admr.*, 80 *Ky.*, 399; *Hanover R. Co. v. Coyle*, 55 *Pa. St.*, 402.)
5. The argument of an attorney to warrant a reversal must be a most flagrant abuse of the attorney's privilege in presenting his client's case. (*City of Covington v. Glennan*, 2 *Ky. Law Rep.*, 215.)

JUDGE GRACE DELIVERED THE OPINION OF THE COURT.

This appeal by appellant is from a judgment of the Jefferson Circuit Court in favor of appellee for the sum of five hundred dollars, recovered for injuries sustained by Willie

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Camp while being carried in the elevator of appellant, at the Willard Hotel, then operated by this company.

The injury occurred in November, 1891. This suit has been twice tried, the first trial resulting in a verdict for the defendant. This was set aside and a new trial granted by the court, and this is the first complaint of appellant.

The evidence tended to show that this elevator was a heavy one, having a double department, one for passengers and the other for freight, and that it was operated by two boys, Frank Jackson and Claude Smith, by turns; that this accident happened near the change of the boys; that Claude Smith, the younger and smaller boy, and less experienced, was operating the elevator. And that Frank Jackson was in the elevator waiting for his watch to come on. That the little boy, Willie Camp, had just gone up with his father, but forgetting some cigar boxes he wanted, had gone back, got his boxes, and was going up to his floor again. That when getting in the elevator he took his seat on one of the benches as customary, but that Frank Jackson said he would draw for the boy a picture and not wanting Camp to see it until it was finished, told him to sit down on the floor, which the boy did, as he says about the middle of the elevator, meaning, as we gather it from the evidence, about the middle from side to side, but immediately in front of the door, and manifestly not a great way from it. And that while thus sitting a moment, Jackson called his attention, and in turning on the floor towards Jackson, his foot was caught between the elevator at the door and the joists of one of the floors as it ascended. That his heel was mashed, the small bone of his leg was broken, and the tendon strained and shortened. This leg for some distance up towards his knee was bruised and injured.

It appears that his injuries were serious, and painful, that

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his limb was placed in a plaster of Paris bandage for some weeks, and after that in a sole-leather bandage. That he finally got out of bed, but that even at the time of the second trial his leg still hurt him, not continuously, but when he walked any considerable distance on it. The physician who attended him expressed the opinion that the injury had materially injured the boy's nervous system, and impaired his general health.

Some testimony was offered showing that the smaller boy, Smith, was too light to operate this elevator with perfect control. That occasionally he had to jump up, seize the rope with his hands, and remain suspended by it. Though the evidence shows the elevator was at this time stopped in a reasonably short distance after the little boy, Camp, cried out.

The charge in the petition was that the two boys, Jackson and Smith, were unfit to operate this elevator with safety, and that the appellant company was guilty of negligence in employing and in retaining them for this work, and that they, the boys, were guilty of negligence in operating the elevator, whereby plaintiff was injured. Camp was at the time of the injury less than seven years old.

This was substantially the evidence on both trials. It may be added, however, that the boys, Smith and Jackson, had been warned by the mother of the boy, Camp, to be careful, and to make him sit on the seats when in the elevator.

On the conclusion of the evidence for plaintiff on each trial, appellant moved the court for a peremptory instruction. This was refused each time.

The first verdict was set aside and a new trial granted because the court misinstructed the jury, and because the court excluded some evidence properly admissible as a part of the *res gestae*, this being a statement made by Jackson

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to Mrs. Camp immediately after the injury and while Jackson had the injured boy in his arms, having carried him to his mother's room.

The court in the first trial failed to lay down correctly the degree of care, skill and diligence necessary to be used in operating an elevator, saying in general terms that if the defendant or its agents operating the elevator were guilty of negligence whereby the injury occurred then they should find for plaintiff, otherwise for the defendant, and failed to attach any definition of either diligence or negligence to the instructions on the first trial. This error alone in the instruction given was sufficient to authorize the court to grant a new trial.

This error was corrected by the court on the second trial, as follows, viz.:

"First, The court instructs the jury that it was the duty of the defendant to exercise the highest degree of care and skill usually exercised by prudent persons in the same business, in the management and operation of the elevator in which plaintiff was riding at the time he was injured. And if they believe from the evidence that the defendant failed to exercise that degree of care in the selection of its agents or servants to run said elevator, or if they shall believe from the evidence that the defendant's agents or servants in charge of said elevator, whether competent or not, failed to exercise that degree of care in the management thereof, and that plaintiff was injured by reason of such failure, then the law is for the plaintiff, and they should so find, provided they further believe from the evidence that the plaintiff was not guilty of negligence which contributed to cause his injuries. And that he would not have been injured, but for his contributory negligence, if any there was.

No. 2 seems to be the reverse of this.

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In No. 3 the court again speaks of contributory negligence by plaintiff as barring his recovery, but adds this important limitation: "But the jury ought not to find plaintiff contributed by negligence to cause his injury, unless they shall believe from the evidence that he failed to exercise that degree of care for his own safety which ordinarily careful and prudent children of his age, experience and discretion are accustomed to observe under same or similar circumstances."

The main instruction, No. 1, as well as this limitation as to the care and prudence to be expected of this child, we think are correctly set forth by the court.

It is the same degree of care, skill and diligence that this court has so often held applicable to railroads in carrying passengers, and which seems to be the settled law on that subject in Kentucky.

In Mr. Ray's work on Negligence it is said: "The relation between the owner and manager of an elevator for passengers, and those carried in it, is similar to that between an ordinary public carrier of passengers and those carried by him. And he is liable to be treated as a public carrier of passengers, and the same responsibilities rest on him as to diligence and care, as to the carrier of passengers by stage-coach or railway."

And, again, same author says, p. 308: "A proprietor of an elevator for carrying passengers, who used the elevator in lifting persons vertically to the height of forty feet, is a carrier of passengers and subject to the same responsibilities. The same degree of responsibility must attach to one controlling and running an elevator. Persons who are lifted by elevators are subject to great risks of life and limb."

The persons running an elevator must be held to undertake to raise such persons safely, as far as human care and

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foresight will go. The law holds him to the utmost diligence and care of very cautious persons, and responsible for the slightest neglect. There is no employment where the law would demand a higher degree of care and diligence than in the case of persons using and running elevators for lifting human beings from one level to another. The dangers are great, and the law should and does bind persons so engaged to the highest degree of care practicable.’

This doctrine is similarly stated in a case from Minnesota, (*Goodsell v. Taylor*, 41 Minn., 207.); and in a California case (*Treadwell v. Whittier*, 80 Cal., 574), in which latter case the views of Mr. Cooley, equally as strong, are quoted and approved by that court. These authorities, and the reasons given for the doctrine, seem to us to be well founded, and worthy of approval by this court.

They are substantially as submitted to the jury in this case on the last trial, and the jury so instructed found in effect that to suffer and permit this little boy, Camp, of less than seven years of age, to sit in front of the door of an elevator, and so close as that in turning round at the call of one of the boys operating the elevator, his foot and leg were caught and crushed, was negligence in those operating the elevator, who being servants of appellant fixed the liability on their employer. It is well said by counsel for appellee that the position of the little boy on the floor near the door was known to the boy operating the elevator. And that it was a position of danger is shown by the result

Some matters of minor importance are complained of by appellants, including complaint of adverse counsel, and in their briefs each is inclined to criticise the other, but these are matters of no great moment, and where the law has been ruled correctly, and the facts authorize the finding of the jury, we think verdicts should not be disturbed by these

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little unpleasant matters between counsel. In the matter complained of, we think the court exercised a sound judgment and discretion when he said the jury could determine as to any difference in the statement of adverse counsel.

The verdict, \$500 in damages, was not excessive.

The judgment must be affirmed.

CASE 65—PETITION EQUITY—MAY 9.

Farmers' Bank of Kentucky v. Stapp.

97 4:32
108 8:18

APPEAL FROM JEFFERSON CIRCUIT COURT, LAW AND EQUITY
DIVISION

1. **WEIGHT GIVEN JUDGMENT OF CHANCELLOR.**—In cases of equitable cognizance, such as fraud or mistake, if the testimony preponderates for the one side or the other in such a way as to convince this court the chancellor below has erred, his judgment will be reversed, although it may not be flagrantly against the evidence. The rule applicable to verdicts of juries does not apply in such cases, although where the evidence is evenly balanced or so slightly in favor of the one side as to create doubt in the mind of the court, much weight will be attached to the finding below.
2. **FRAUDULENT CONVEYANCE.**—In this action brought by a creditor to set aside a conveyance from the debtor to his wife upon the ground it was intended to defraud creditors, the evidence fails to establish the defense that the land was paid for by his wife and conveyed to the husband by mistake, and that his conveyance to her was intended to correct that mistake. As the conveyance attacked recites that the husband is free from debt, and that the consideration is "love and affection," the testimony establishing the mistake as well as that showing the consideration to have been paid by the wife should at least be strong enough to overthrow the *prima facie* case made out by the deed itself.

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W. P. D. BUSH, FINLAY F. BUSH AND HENRY F. TURNER. FOR APPELLANT.

The judgment of the court below is flagrantly against the weight of the evidence and should be reversed. The facts practically amount to a confession of fraud.

KOHN, BAIRD & SPINDLE FOR APPELLEES.

1. On issues of fact the judgment of the chancellor will not be disturbed unless flagrantly against the weight of the evidence. (Russell v. Turnpike Company, 13 Bush, 307; Williams v. Rogers, 14 Bush, 776; Davidson v. Morrison, 80 Ky., 397; Campbell v. Railroad, 9 Ky. Law Rep., 799; McDyer v. Large, 13 Ky. Law Rep., 430; Williams v. Williams, 13, Ky. Law Rep., 591; Davesac v. Seiler, 14 Ky. Law Rep., 497; Harris v. Ash, 15 Ky. Law Rep., 679.)
2. Nor will the court enter into a minute scrutiny to determine the preponderance. (Varble v. Bigley, 14 Bush, 698.)
3. A mere preference is not a fraud, and is valid against all attacks except under the statute against preferences. (Givens v. Gordon, 3 Met., 539; Wintersmith v. Poynter, 2 Met., 487; Whitehead v. Woodruff, 11 Bush, 209; Matthews v. Lloyd, 11 Ky. Law Rep., 843.)
4. Both husband and wife can not testify. (Civil Code, sec. 606; Booth v. Van Arsdale, 9 Bush, 719; Wise v. Foote, 81 Ky., 13; Howard v. Tenny, 87 Ky., 55; Tabor v. Harding, 9 Ky. Law Rep., 491; Covington v. Geiler, 14 Ky. Law Rep., 145.)
5. A rejected pleading can not be considered unless embodied in the record by bill of exceptions. (People's Mutual v. Boesse, 92 Ky., 293.)
6. A judgment is barred in fifteen years after issual of the last execution. (Kentucky Statutes, sec. 2514; Civil Code, sec. 401.)
7. No lien is obtained by filing suit under sec. 439 of Code, except on property described or attached. (Warren v. Robinson, 1 Bush, 294; Hoffman v. Thomas, 2 Duv., 106.)
8. The life of a judgment can be prolonged only by issuing executions, and not by bringing suit under sec. 439 of Civil Code. (Ky. statutes, sec. 2514; Civil Code, sec. 401; Dorsey v. Phillips, 84 Ky., 422; Proctor v. Bell, 16 Ky. Law Rep.)

CHIEF JUSTICE PRYOR DELIVERED THE OPINION OF THE COURT.

In the year 1877, the appellant, having a judgment against W. A. Stapp, had an execution issued upon it, that was returned *no property found*. This action was afterwards in-

Farmers' Bank of Kentucky v. Stapp.

stituted in March, 1892, by the appellant, assailing certain conveyances of property by the husband to the wife, on the ground that the conveyance was in fraud of creditors.

In the petition this state of fact is alleged: In the year 1885 (September 10), Robert Johnson conveyed to W. H. Stapp a lot in the city of Louisville, at the Northwest corner of Sixteenth and Walnut streets, for the sum of three thousand dollars. In May, 1887, W. H. Stapp conveyed to his wife (the appellee) this lot in consideration of love and affection, the deed reciting that the grantor was then not in debt. In 1888 the husband and wife, or the wife, purchased of one Nehan, a lot situated at Twenty-sixth and Walnut streets for \$10,000, and the lot conveyed by the husband, W. H. Stapp, to his wife was taken as part payment on the ten thousand dollar purchase, the lot being valued at \$4,000. The valuation, \$4,000, was in fact the first payment made to Nehan.

The appellant obtained an attachment that was levied on this lot (purchased of Nehan) as the property of the husband, and asked that it be sold to satisfy the judgment.

The defense of Stapp and his wife is that the lot deeded by Johnson to Stapp was purchased for or by the wife with her own means, and the deed to him, Stapp, was executed by mistake, and that this conveyance to his wife was simply to correct the mistake.

This raised an issue of fact, the solution of which determines the rights of the parties. The conveyance by Stapp to his wife contains the following recital: "Whereas, I, the undersigned, William H. Stapp, party of the first part, am free from debt, and desire to secure to my wife and family a homestead, now, therefore, in consideration of love and affection," and then follows the ordinary verbiage contained in such instruments.

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It is conceded that this judgment against Stapp was then in force, having been obtained years before in the Henderson Circuit Court, and the object of the conveyance being plainly manifested on the face of the deed as well as the party furnishing the consideration, the testimony establishing this mistake, as well as that showing the consideration to have been paid by the wife, should at least be strong enough to overthrow the *prima facie* case made out by the deed itself. This the appellee failed to do, and when examining the entire testimony upon this issue we are satisfied the recitals in the conveyance give the true history of the transaction. Counsel for the appellee are mistaken in supposing that in cases of equitable cognizance such as fraud or mistake, this court will regard the decision of the chancellor as we would the verdict of a jury, and refuse to set aside the judgment unless flagrantly against the evidence. That proper consideration will be given the opinion of the court below in any case necessarily follows, but where the testimony preponderates for the one side or the other in such a way as to convince this court the chancellor below has erred, his judgment will be reversed.

Loose declarations are found in some of the cases attaching so much importance to the chancellor's opinion as to indicate the application of the same rule of practice to his judgment as to the verdict of a jury. This, however, is not the rule. Where the original jurisdiction is with a court of equity, or concurrent with that of a common law court, and has been decided by the chancellor, the weight of the evidence must prevail, but where evenly balanced, or so slightly in favor of the one side as to create doubt in the mind of the court, much weight will be attached to the opinion below.

This conveyance from Stapp to his wife seems to have

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been written by one skilled in the law, and why he should have departed from the real facts of the case (if the husband's version is correct), and make out a case of fraud by the very recital in the deed, is difficult to perceive. The attorney has not been examined as a witness, but the husband undertakes to explain why it was, and attempts to show the consideration as moving from the wife, and the money paid to Johnson out of her own means.

It is claimed by the husband that this money, the \$3,000, was paid Johnson by his wife, but when paid, or how paid, or where she kept her money, he is in entire ignorance, and does not even know who made the trade with Johnson.

In the year 1877 Mrs. Stapp was made a feme sole, and was then living in Henderson, Ky. In 1884 or 1885 she received from her grandfather's estate \$1,400, and after that received \$1,000. After she received this money, or even her real estate from which it was derived, she formed a partnership with one Sugg, in Henderson, in the hotel business. They failed in business and made an assignment, and some of their creditors have never yet been paid. It is said that the assignment was not on account of insolvency, but merely for the purpose of winding up an unprofitable business. Still the fact that Mrs. Stapp was out of means and disturbed as to her condition is made certain by those who knew her at Henderson. Her husband had then left Henderson and gone to Louisville, where his wife, shortly after the hotel failure, joined him.

He seems to have prospered in business after he went to Louisville, and had accumulated means to such an extent as enabled him to make an expenditure of \$3,500 a year for the support of himself and family. It is immaterial how he made this money, only to the extent that it shows his ability to furnish this money and the inability of the wife, the latter

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having failed, and the husband making rapid accumulations. If Mrs. Stapp kept in her possession, or under her control, this \$1,400 and \$1,000, and the additional \$500 she obtained, it is most singular that her husband never knew where she kept it, or what use she had been making of it for several years.

His testimony might have shown that she had loaned the money out. That she had deposited in bank, or invested it in stocks or property, but what disposition she made of it, or how she kept it, is best stated in his own language. When asked where she kept this money, his answer was: "I don't know; she kept it at home, I presume."

It is apparent when Stapp left Henderson he had no means. It also appears that his wife failed in business, and had actually borrowed \$200 of her sister, and, finally, made an assignment, and now it is maintained that through all these pecuniary troubles she kept this money on her person or at her home.

It is shown by some witness that he saw the wife with a roll of money before she left Henderson, but how much he does not know, nor is there any testimony in any way of a convincing character tending to show that the wife paid this money, but on the contrary the husband evidently paid it, or advanced the means for that purpose.

The judgment is therefore reversed, and cause remanded for proceedings consistent with this opinion.

Halley, &c v. Winchester Diamond Lodge.

CASE 66—PETITION EQUITY—MAY 9.

Halley, &c v. Winchester Diamond Lodge.

Halley v. Winchester Diamond Lodge.

APPEALS FROM CLARK CIRCUIT COURT.

1. **FAILURE OF MAKER OF TRUST TO JOIN WITH TRUSTEE IN CONVEYANCE—RENTS AND IMPROVEMENTS.**—Where land was conveyed to a trustee with power to sell and convey the land, and apply the proceeds to the payment of certain debts of the grantor, which were a lien upon the land, and the land was sold and conveyed by the trustee and the proceeds applied as directed, that sale and conveyance having, in an action brought by the purchasers to quiet their title, been treated as void because the grantor in the deed creating the trust did not unite with the trustee in his conveyance, the purchasers should be allowed, as against the heirs of the trustee's grantor, to treat the rents as an equivalent to the interest on the purchase money, and have an account for improvements, which they have erected in good faith, the trustee's grantor having acquiesced in the sale and conveyance by the trustee and the erection of the improvements by the purchasers, and even rented from them a part of the land. Under these circumstances the rule indicated, which is that usually applied between vendor and vendee where the contract is rescinded because the title can not be perfected, is the equitable one, and should be applied rather than the rule generally applied between adverse claimants, the heirs of the grantor occupying no better attitude than their ancestor would occupy if living. In such cases courts of equity follow no rigid rule, where to do so would be unjust and oppressive.
2. **SAME.**—It is doubtful if the statute of 1820 (Gen. Stats., chap. 63, sec. 22) prohibiting conveyances by trustees unless the maker of the trust joined therein, is applicable to this case, in view of the purpose for which the deed of trust was executed, and the fact that the wife of the debtor was required to join in the deed, thus indicating a purpose on the part of the grantors to surrender all interest in the property and in the execution of the trust. But in the absence of the deed of trust from the record the court will not decide that question (which is raised by the cross-appeal), although it is strongly inclined to hold that the statute is not applicable.

Halley, &c v. Winchester Diamond Lodge.

B. F. BUCKNER FOR APPELLANTS.

1. The appellants under the rule applicable to adverse claimants are entitled to recover against the appellees the reasonable rents and profits on the lands for the time they were held by the appellees. (Mayne on Damages, 391; 1 Chitty on Pleading, 215; Meyers v. Sanders' Heirs, 8 Dana, 65; Marshall v. Dupuy, 4 J. J. M., 388; Boyd v. Barclay, 4 Dana, 227; Harris v. Jones, 6 B. M., 389; R. & L. Turnpike v. Rogers, 7 Bush, 535; Trabue v. Kellar, 3 Mar., 518; Thomas v. Thomas' Exors., 16 B. M., 421.)
2. The rule usually applied between vendor and vendee where the contract is rescinded because the title can not be perfected, which considers the interest on the purchase money paid as equivalent to the rents on the lands, does not apply to this case. (Williams' Heirs v. Wilson, 4 Dana, 509; Cogwell's Heirs v. Lyon, 3 J. J. M., 41; Morton's Heirs v. Ridgway, 3 J. J. M., 258; Taylor v. Porter, 2 Dana, 275; Bell v. Barnett, 2 J. J. M., 530; Ewing v. Handley, 4 Littell, 372.)
3. The appellees are entitled to recover as an allowance for improvements only the enhanced value of the land by reason of the improvements erected.
4. The land was conveyed to the appellees by the trustee without the grantor joining in the deed, and no title, therefore, passed by the conveyance; nor can the appellees proceed either against the heirs of the grantor or the land for the recovery of the purchase money, since there was no warranty of title. (Gen. Stats., chap. 63, art. 1, sec. 22.)
5. Even viewing the sums of money paid to the trustee as debts against the estate of the grantor, it was essential to a recovery that the personal representative be made a party, and that the verification required by law should precede the judgment for the sale of the land. (Lawrence v. Hayden, 4 Bibb, 229; Landsdale v. Cox, 7 Mon., 402; Gen. Stats., c. 44, sec. 6; Haggin v. Patterson, 10 Bush, 441; Civil Code, sec. 437.)
6. The only legal or equitable right which the appellees can claim is the right of subrogation to the right of the trustee to recover from the persons to whom he paid the purchase money.

BECKNER & JOUETT FOR APPELLEES.

1. In no event have the appellants any equitable interest in the land, since, if there was left any estate of value in the land, it should go to the payment of the balance on the debt for the satisfaction of which the conveyance in trust was made.
2. The grantor, if living, would be estopped to set up any claim to the property, since for three years after the conveyance he

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- acquiesced in the sale of the same by the trustee as directed by himself, and failed to raise any objection to the making of improvements by the appellees. The appellants are entitled to no more rights than he had. (*Prather v. McDonald*, 8 Bush, 46; *Butler v. Miller*, 15 B. M., 625.)
3. The wife of the grantor can not assert right of dower since she joined in the conveyance to the trustee.
 4. The grantor having given to the trustee the power and directed him to sell the property conveyed in trust for the payment of certain of his debts, the act of 1820 does not apply. (*Ogden v. Grant*, 6 Dana, 173; *Reed v. Welch*, 11 Bush, 450.)
 5. The purchase price paid by the appellees to the trustee was applied to the payment of a debt which was secured by a mortgage; and the appellees are entitled, upon defect in their title, to be substituted to the rights of the mortgagee, and to be allowed a lien upon the land for the recovery of the purchase money. (*McC Campbell v. McC Campbell*, 5 Littell, 92; *Story's Equity Jurisprudence*, sec. 1237; 1 Marshall, 246; 4 Littell, 371; 1 Marshall, 389; 1 Monroe, 161; 4 Bibb, 511; 2 Monroe, 126; 3 B. M., 66; 14 B. M., 293; 16 B. M., 424; 5 Bush, 433; 7 Bush, 45; 9 Bush, 718; 80 Ky., 189; 10 Ky. Law Rep., 879; 7 S. W. Rep., 538; Gen. Stat., ch. 80, sec. 1.)
 6. The amount allowed by the court for improvements was not palpably or flagrantly against the evidence, and the appellants are, therefore, not entitled to a reversal. (*Proctor v. Smith*, 8 Bush, 85; *Hall v. Brumond*, 7 Bush, 44; *Haskins v. Spiller*, 3 Dana, 575; *Whitledge v. West, Sneed*, 336.)

GEORGE B. NELSON ON THE SAME SIDE.

1. The rule which pertains to the adjustment of rents and interest between the vendor and vendee upon a rescission of the contract for failure to make perfect title, under which the rents and interest are considered as equivalent, is applicable to this case. (*Williams' heirs v. Wilson*, 4 Dana, 509; *Taylor v. Porter*, 1 Dana, 423; *Williams v. Rogers*, 2 Dana, 375.)
2. The appellees having, upon the faith of a colorable title by reason of the conveyance to them by the trustee, paid the purchase price of the land, and taken the possession of same, and erected improvements upon same, they can not now be deprived of the possession thereof by the heirs without first receiving just compensation. *Bell's Heirs v. Barnett*, 2 J. J. Marshall, distinguished.

L. H. JONES OF COUNSEL ON THE SAME SIDE.

JUDGE HAZELRIGG DELIVERED THE OPINION OF THE COURT.

On June 9, 1875, Anderson Halley and his wife, and Ben Simpson and his wife, conveyed to W. M. Beckner certain real estate in the city of Winchester in trust, with power to sell the same and convey it to the purchaser, and with the proceeds pay a debt due one John Taliaferro, secured to him by a mortgage on the land. The remainder of the purchase price, if any, was to be applied to the payment of a lien on the land held by Ben Simpson. In execution of the trust Beckner sold the lands to the appellees, and applied the proceeds to the Taliaferro debt, there being nothing left for the Simpson debt, but in the conveyances made therefor neither of his grantors or their wives joined.

The appellees were put in possession of the respective portions bought by them, and erected valuable improvements thereon. In October, 1889, conceiving that the failure of Beckner's grantors to join in the conveyances created a cloud on their title, the appellees brought these suits in the nature of *quia timet*, making Beckner and the heirs and representatives of Halley and Simpson defendants thereto.

A demurrer was sustained to their petitions, and thereupon, without in terms abandoning their claim of ownership, the appellees filed amendments setting out the amount of purchase money paid by each, and the value of the improvements erected by them on the property.

Issues were joined, and the cases heard after reference to the master, who took proof as to the improvements, rents, etc. The court rendered a judgment subjecting the property to the payment of the purchase money paid out by the respective appellees, and to the payment, also, of the value of the improvements.

No defense was made for the Simpsons, but the Halleys have appealed from the judgment, insisting that although they are adjudged to be the owners of the property, yet the conditions imposed—of paying the large sums adjudged to be liens on the property—are not such as the law authorizes.

They contend that by this judgment "the wrongful occupants of land adjudged to have no title are repaid the total amount of their purchase money, the amount expended for improvements, the amount expended for taxes, are given the use of land *gratis* during more than seven years, and the real owners are adjudged to be entitled to possession only on paying this extravagant account of charges."

The case of Myers, &c. v. Sanders' heirs, 8 Dana, 65, is urged as a case exactly in point, where this court said: "It would seem inconsistent with all rule to allow a trespasser to make the person trespassed against his debtor for improvements made without his consent and against his will, or to allow him to set them off against the damages to which he has justly subjected himself by his trespass."

Many other cases of like import are also cited by counsel for appellants.

On the other hand, counsel for the appellees contend for the application of the rule recognized in Williams v. Rogers, 2 Dana, 374, where the court said: "Where there has been no fraud or manifest injustice in the conduct of either party, and the one has enjoyed the use of the land, and the other has enjoyed the use of its accepted equivalent, the general rule of equity now recognized in this court, is that in decreeing a rescission for inability to convey the legal title, the land should be restored to the vendor, without any account for profits, and the price should be refunded to the vendee, without interest; whereby, according to their own

estimate of equivalents—the one deeming the use of the price, to him, equal to that of the land, and the other deeming the use of the land, to him, equal to that of the price—they would be each so far reinstated. But if the vendee shall have made valuable and permanent improvements, or shall have committed waste, or otherwise *improperly* injured the land, there should be an account for waste, if any, and for improvements, if any.” And this rule is shown to have been adopted and approved in many cases.

The question presented, in view of these contentions, therefore, is what rule is to be adopted in the adjustment of rents, interest and improvements?

If the one generally applied between adverse claimants of land, by which the successful claimant becomes entitled to all the incidents of ownership for the time he has been wrongfully kept out of possession, subject to an equitable set-off for ameliorations, then the judgment is erroneous, but if the one usually applied between vendor and vendee when the contract is rescinded because the title can not be perfected, and the vendee is allowed, upon being compelled to surrender the property, to treat the rents as an equivalent to the interest on the purchase money, and have an account for improvements, if any, then the judgment is to be approved.

It is apparent that the parties to the original transactions acted in the utmost good faith. The deed of trust is not in the record, but the averments of the petition show that Halley and Simpson, *together with their wives*, conveyed the property to Beckner for a certain specific purpose, and he was empowered to sell and convey it to the purchaser.

It may well be argued that the grantors had no further interest in the property, and intended to reserve none in the execution of the trust. The circumstance that their wives

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were required to join in the conveyance is in harmony with the intention to so surrender all interest, hence it is doubtful if the statute of 1820 (Gen. Stat., chap. 63, art. 1, sec. 22), prohibiting conveyance by trustees unless the maker of the trust join therein, is applicable to this case. We are so treating the conveyance herein, and only refer to the doubtful application of the statute to show that the subsequent conduct of the parties was in accordance with the apparent intention on the part of the grantors to release all interest in the property. The purchasers (appellees) bought and paid for the property in like good faith, and erected valuable improvements under the belief that they had perfect title.

While the appellants and the appellees technically occupy the attitude of adverse claimants, yet the appellants in fact claim only through and under their ancestor, Anderson Halley, and we think can occupy no better attitude than he would occupy if he were living. The proof shows he lived several years after the sale and conveyance by Beckner, and approved of and consented to that sale. Indeed, had rented some of it from the vendee of Beckner. He stood by without objection and saw the appellees pay full value for the property, and expend their money on it in the erection of valuable improvements.

To apply the rule contended for by learned counsel for appellants, under such circumstances, would be most inequitable, and we would apply it only in pursuance of some inexorable law demanding it. There are a multitude of cases touching questions somewhat similar to the one under consideration, and while certain general rules are followed, it seems to be the purpose in all the cases to follow no rigid rule where to do so would be unjust and oppressive.

And what rule more just can be applied in this case than to limit and subordinate the right of the heir to that of his

ancestor? Even the mortgage debt due by the ancestor to Taliaferro remains unsatisfied, and so also the Simpson lien. These were not even debts against Halley, but were liens on the land, and upon the plainest principles of equity the appellees would be entitled to be subrogated to the creditor, Taliaferro, whose lien they satisfied, and this is effected by the chancellor as the judgment charges the land with the purchase price paid to Beckner by the appellees.

On the cross-appeal of the appellees it is enough to say, in the absence of the deed of trust, and on the rather indefinite recitation of its contents in the petitions, that we are not disposed to consider the question whether or not the conveyance to Beckner is within the statute named.

Under the principles announced in *Ogden v. Grant*, 6 Dana, 473, *Prather v. McDowell*, 8 Bush, 46, *Reed v. Welsh*, 11 Bush, 450, and other cases cited, it may well be doubted whether the makers of the deed of trust in this case needed to have joined in the conveyance made by Beckner. But the deed, as we have seen, is not before us, and we adopt the chancellor's construction of it for that reason, under a strong inclination, we admit, to hold the statute inapplicable.

Let the judgment on the original and cross-appeal be affirmed.

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CASE 67—PETITION ORDINARY—MAY 10.

Kendall's Executor v. Collier.

APPEAL FROM GRANT CIRCUIT COURT.

1. **NON EST FACTUM—EVIDENCE.**—While the main issue in this case is as to the validity of the note sued on, under the plea of "non est factum," yet as all indebtedness of every kind is denied by the answer, and a full and final settlement between the parties is pleaded in the answer and put in issue by the reply, testimony tending to show an existing indebtedness to plaintiff from the defendant's testator, whose name was signed to the note, was properly admitted.
 2. **TESTIMONY AS TO TRANSACTIONS WITH DECEDENT.**—While the testimony of plaintiff as to transactions with the decedent may not have been prejudicial because the facts to which he testified were established by the testimony of other witnesses, yet upon another trial the court should exclude such objectionable testimony.
 3. **TESTIMONY AS TO HANDWRITING.**—To enable one to testify as to the genuineness of the handwriting of another it is sufficient that he has seen him write.
 4. **SAME.**—A witness who expresses an opinion as to the genuineness of the handwriting of another, whether as an expert or having seen the person write, should be allowed to give the reasons for his opinion.
 5. **SAME.**—It was error to permit a witness, in addition to his statement as to the genuineness of the signature in question based on his knowledge from having seen the decedent write, to testify that he had examined the note sued on several months before, with a view to having it discounted by a bank with which he was connected, that he had then compared this signature with the signature of decedent to other papers which he knew to be genuine, but which other papers he had now lost and was unable to produce, and that he had sent this note with these other papers to a bank expert for the purpose of having him compare the signature, and that after this investigation his bank had actually discounted the note.
- DICKERSON & WILLIS FOR APPELLANT.**
1. The only defense made to the note was *non est factum*, and all testimony was inadmissible except such as tended to elucidate the one question whose handwriting the signature was.
 2. It was error to allow the appellee to testify against the decedent

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as to transactions had with said decedent, and acts done or omitted to be done by him. (Civil Code, sec. 606, sub-sec. 2; Jeffers v. Simpson, &c., 11 Ky. Law Rep., 328.)

3. The testimony of witnesses that decedent had at various times extending over several years admitted that he had plaintiff's money was incompetent because:

(a.) Evidence of indebtedness is not competent or relevant on an issue of *non est factum*:

(b.) The witnesses do not specify a sum corresponding to the amount of the note, or fix the date of the conversations either at or near the time the note was executed:

(c.) The amounts are so indefinite as to be incompetent upon any issue:

(d.) The conversations extended over a period of several years, during which time the relations of the parties were continually changing.

4. The admission of testimony of witnesses who testified as experts in handwriting, and expressed their opinions as to the genuineness of the signature, was erroneous, none of them having ever held positions in business which made it necessary to scrutinize and examine signatures and handwritings.
5. It was error to permit a witness to testify that he had, prior to the trial, made an examination of the note with a view to its purchase by the bank of which he was vice-president, and compared it with other checks and writings, which had afterwards been lost, and had sent them to a bank expert in Cincinnati for examination, and that the bank had afterwards discounted the note. (Civil Code, sec. 604 and Amendment of May 17, 1886.)
6. The court improperly refused to allow the witnesses for the appellant to give their reasons for their opinions that the signature was spurious, after permitting the appellee to give reasons for opinions that it was genuine.
7. The verdict of the jury was flagrantly against the evidence.
8. The note was not signed at the close of the instrument as required by sec. 468, of the Kentucky Statutes.

A. G. DEJARNETTE FOR APPELLEE.

1. The objection raised to the testimony of appellee can not avail since he did not testify "concerning any verbal statement of, or any transaction with, or any act done, or omitted to be done, by the deceased," and besides no exceptions were noted to his testimony.
2. The court properly refused to allow the witnesses for appellant, testifying as experts concerning the genuineness of the signa-

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ture, to give their reasons for the opinions which they expressed, that being a matter to be brought out on cross-examination in the discretion of the adverse party.

3. The rulings of the court were not prejudicial to the substantial rights of the appellant, since under the testimony of living witnesses, the circumstances confirmatory thereof, and the admissions of the decedent, the finding could not have been otherwise.

JUDGE EASTIN DELIVERED THE OPINION OF THE COURT.

This action was brought by appellee against appellant H. C. Chinn, as executor of the estate of T. R. Kendall, deceased, on a promissory note purporting to have been executed by decedent for the sum of five hundred dollars, and also on an open account for the sum of about twenty-six dollars alleged to be owing from decedent at the time of his death, but against which appellee, in his petition, admitted a counter indebtedness on his part to appellant for the sum of about thirty-six dollars.

For the purposes of this appeal it is not necessary that we should notice these smaller items, and we shall treat the case as though it involved the claim on the five hundred dollar note alone.

The answer of appellant denied that this note was executed by his testator, and charged that the signature to the paper, which was filed with the petition, was not the genuine signature of testator, and that the note sued on was not his act or deed. It further charged that appellee and testator had, a short time prior to the death of the latter, a full and complete settlement of their accounts, which showed an indebtedness from appellee to decedent, and denied any indebtedness whatever from the estate of decedent to appellee. To this answer a reply was filed, putting in issue all its material allegations.

On the main issue raised by the plea of "*non est factum*,"

as to the note, much proof was heard on both sides at the trial, and the case, having been submitted to a jury, under instructions from the court, a verdict was returned by the jury sustaining the validity of the note sued on, and in these words, to-wit: "We, the jury, find for the plaintiff the amount of the note sued on, five hundred dollars, with six per cent. interest thereon, from the 17th day of February, 1891, until paid, less balance of nine dollars and seventy-five cents due the defendant, T.R. Kendall, on account." And a judgment in pursuance of said verdict was entered against appellant by the court below.

Thereupon appellant filed a motion and grounds for a new trial, and, the same having been overruled, he excepted, prepared and presented his bill of exceptions, and prayed this appeal.

The grounds assigned in support of the motion for a new trial are numerous, many of them being based upon alleged specific errors occurring at the trial, in addition to the general alleged ground that the verdict is palpably against the weight of the evidence. As to this general ground, it is sufficient for us to say that the evidence as to the genuineness of the signature in question is conflicting, that there was some competent evidence introduced on both sides of this question, and that it was the province of the jury to weigh and determine on which side the evidence preponderated.

We shall, therefore, confine ourselves to a consideration of some of the alleged specific errors complained of, and, in the first place, as to the admission by the court below of evidence tending to show an existing indebtedness to appellee from appellant's testator, and showing admissions of indebtedness on part of the latter a short time previous to his death, in view of the fact that this case must go back to the

lower court for a new trial, on other grounds, and for the guidance of the court and the parties we desire to say that we do not regard the admission of this testimony as error, under the circumstances of this case. While the main issue in the case is unquestionably as to the validity of the note sued on, under the plea of "*non est factum*," yet all indebtedness of every kind is denied by the answer, and a full and final settlement between the parties is pleaded in the answer, and put in issue by the reply. This evidence was, in our opinion, properly admitted.

Then, as to the testimony of the appellee himself, the court below must have recognized the fact that by the provisions of subdiv. 2 of sec. 606 of the Civil Code, he is expressly prohibited from testifying as to any transaction between himself and decedent, and yet a small portion of his testimony would seem to fall within the condemnation of that rule. It is perhaps true, as contended by counsel for appellee, that these facts are established by the testimony of other witnesses, and that, for this reason, appellant's substantial rights were not prejudiced by the admission of appellee's statements, yet, upon the return of the cause for another trial, the court should exclude all such objectionable testimony.

Again, as to the contention of counsel for appellant that the testimony of the several witnesses, Blackburn, Ashby, Rhyns and Price, who all gave it as their opinion that the signature of decedent to the note was genuine, should have been excluded, on the ground that they had not shown themselves qualified to speak on this subject, we can not concur with counsel. Neither of these witnesses is shown to possess any special proficiency in the matter of judging of handwriting, or to occupy any position or pursue any calling which would give them special qualifications, or make them

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experts in this line. But, according to the evidence, as shown in the bill of exceptions, each of them stated that he had seen decedent write often, and that he knew his handwriting. Surely this knowledge, thus derived, gave each of them the qualifications necessary to render his testimony competent, though the value and the weight of such testimony would, necessarily, be left to the jury. Mr. Greenleaf says: "There are two modes of acquiring this knowledge of the handwriting of another, either of which is universally admitted to be sufficient to enable a witness to testify as to its genuineness. The *first* is from *having seen him write*. It is held sufficient for this purpose, that the witness has seen him write but once, and then only his name. The proof in such case may be very light, but the jury will be permitted to weight it." (Greenleaf on Evidence, vol. 1, sec. 577.) Clearly then this testimony was not incompetent.

And this brings us now to the consideration of another portion of the testimony of the witness, Price, who is a practicing physician and also vice-president of the Dry Ridge Deposit Bank, which is, in our opinion, clearly incompetent, and which should not have been admitted. This witness, in addition to his statement, as to the genuineness of this signature, based on his knowledge derived from having seen decedent write, was also permitted, over the objection of appellant's counsel, to testify that he had examined this note several months before, with a view to having it discounted by the bank with which he was connected, that he had then compared this signature with the signature of decedent to other papers which he knew to be genuine, but which other papers he had now lost and was unable to produce, and that he had sent this note with these other papers to a bank expert in Cincinnati, for the purpose of having

him compare the signatures, and that after this investigation his bank had actually discounted the note.

It seems to us manifestly incompetent to give a party the benefit of statements based upon an examination made by the witness out of court, months before, and upon a comparison with signatures to other papers not produced before the jury, and as to which we have the bare statement of the witness that they were genuine, to say nothing of his statements as to having sent them to a Cincinnati expert, who is not even called on to testify, but as to whose opinion the jury is left to indulge such presumption as it may see fit, in view of the fact that, after all this, the bank bought the note.

The lower court clearly erred in admitting this testimony.

Another ground of complaint urged by counsel for appellant is based upon the refusal of the court below, to permit any of appellant's witnesses, who testified their belief that the signature to the note was not genuine, to state to the jury the ground of, or reason for, such belief.

Appellant introduced a number of witnesses, about one-half of whom testified from a knowledge of, and an acquaintance with, decedent's handwriting, and the other half, who were more or less skilled in such matters by reason of their occupation and experience, from a comparison of the disputed signature with the signature of decedent to a very large number of checks and other papers filed in this case, and admitted to be genuine, and all of whom testified that this signature was not, in their opinion, genuine.

Appellant then proposed, by further questions, to have each of these witnesses state the grounds upon which this opinion was based, and to point out and explain to the jury the differences which they detected and which induced this belief on their part. An objection on part of counsel for

appellee to this line of interrogation was sustained by the court. An avowal was made by counsel for appellant as to what would be testified to by each witness, and, over his objection, it was ruled by the court that the witness could state his opinion as to the genuineness of the signature, but that there he must stop, and could not give his reasons therefor, or point out to the jury the supposed discrepancies in the signatures which led to this opinion.

In the ruling we think the court erred to the prejudice of appellant.

Mr. Greenleaf, referring to evidence based upon a comparison of handwriting, says:

"The admission of some evidence of this kind is now too well established to be shaken. It is agreed that if the witness has the proper knowledge of the party's handwriting, he may declare his belief in regard to the genuineness of the writing in question. He may also be interrogated as to the circumstances on which he founds his belief" (Greenleaf on Evidence, vol. 1, sec. 576.)

The Supreme Court of Massachusetts in passing on this identical question, said: "The witness, Smith, who was called as an expert, was rightly allowed to give the reasons for the opinion that he expressed. This point was adjudged in *Commonwealth v. Webster*, 5 Cush, 301; and in *Collier v. Simpson*, 5 Car. and P., 73. Tindal, C. J., ruled that counsel might ask a witness, who was called to testify as an expert, 'his judgment and the grounds of it.' The value of an opinion may be much increased or diminished in the estimate of the jury, by the reasons given for it." (*Keith v. Lothrop*, 10 Cush, 457.)

The closing sentence of this quotation from the Massachusetts case seems to us to suggest a most potent reason in favor of the admissibility of such evidence. To withhold

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it from the jury would be to deprive them, to a large extent, of the very facts best calculated to enable them intelligently to weigh and determine the value of the opinion expressed.

The court below, in this case, refused to allow, not only the experts, but the witnesses who spoke from a personal knowledge of decedent's handwriting, to testify on this line, and, in doing so, erred to the prejudice of appellant.

For the reasons indicated the judgment of the lower court is reversed, and this cause is remanded with directions to award appellant a new trial, and for further proceedings consistent with this opinion.

CASE 68—PETITION EQUITY—MAY 10.

Holland's Assignee, &c v. Cincinnati Desiccating Co.

APPEAL FROM HARDIN CIRCUIT COURT.

SALES OF PERSONAL PROPERTY—RESCISSION OF CONTRACT.—Where a merchant entered into a written contract, agreeing to purchase of a manufacturing company certain amounts of merchandise, and to use reasonable efforts to sell same, the company agreeing to furnish the goods at specified prices, the contract fixing the times of payment and providing that the failure of either party to comply with the conditions of the contract should be deemed sufficient cause for rescission, a rescission of the contract because the purchaser has put it out of his power to pay by making an assignment for the benefit of his creditors can only have the effect to release the company from obligations in the future, and can give it no right to recover goods already delivered, the title to the goods having passed upon delivery.

D. C. HAYCRAFT AND HOBSON & O'MEARA FOR APPELLANTS.

1. The title to the fertilizer passed to the assignor of the appellant

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by virtue of the sale and delivery of same on the 20th of August, and his subsequently becoming insolvent could not affect his title to same; nor could his title be in any way affected, nor the restoration of the property justified, by a rescission of the contract, which was merely an agreement to fill orders upon certain terms. (Hathaway v. Bennett, 61 Amer. Dec., 739.)

2. By the provision of the contract that "failure on the part of either party to comply with the conditions of this contract will be deemed sufficient cause for rescinding same," was meant only that there should be a termination of the arrangement upon failure to comply with its terms and to excuse the parties from it in the future, but not to affect the title to goods already sold at the time of the breach. (1 Greenleaf on Evidence, sec. 273; Finnel v. Clay, 2 Bibb, 351; Lampton v. Haggard, 3 Mon., 15; Bishop on Contracts, secs. 410, 417.)
3. The purchase of August 20 must be considered as purely voluntary in the absence of anything to show that the fifteen tons required by the contract to be purchased had not been purchased prior to that time.
4. The agreement was not recorded and no lien was retained upon the property. (Peabody v. Landon, 15 Amer. St. Rep., 912; Robinson v. Elliott, 22 Wallace, 513 and Note; Means v. Dowd, 128 U. S., 273.)
5. The petition was bad for failing to aver demand or notice or offer to put the parties *in statu quo*.

W. H. MARRIOTT FOR APPELLEE.

1. By the demurrer to the petition the appellant admitted as true the averments of the same that Holland had become insolvent and had put it out of his power to perform the contract or to pay the money when it should become due; and under such admitted facts the appellee is entitled to a rescission. (Commercial Bank of N. O. v. Newport M. Co., 1 B. M., 16; Abney v. Brownlee's Admr., 1 Mar., 240; 5 Lawson's Rights, Remedies and Practice, sec. 2579; Shaffner v. Killiam, 7 Ill., App., 620; Summers v. Saunders, Litt. Sel. Cases, 329.)
2. The fact that the money was not due when the action was instituted does not preclude the appellee from asserting his right under the contract to rescind the same upon failure of Holland to comply with its terms. (McMillan v. M. & L. R. Co., 15 B. M., 234; Hunter v. Anthony, 80 Amer. Dec., 333.)
3. It was not necessary for appellee to give Holland notice of its intention to rescind the contract. (Bryant v. Ishburgh, 74 Amer. Dec., 659; and Freeman's note on Same; Kirby v. Harrison, 59 Amer. Dec., 683.)

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4. The appellant assignee stands in the same attitude as would his assignor. (*Loth & Haas v. Carty*, 8 Ky. Law Rep., 753; *Tandy's Assignee v. Robbins, Willis & Co.*, 8 Ky. Law Rep., 265; *Bank of Commerce v. Payne & Viley*, 10 Ky. Law Rep., 44; *Crozier's Assignee v. Cromie*, 14 Ky. Law Rep., 858.)

JUDGE GUFFY DELIVERED THE OPINION OF THE COURT.

The petition of the plaintiff in this action alleges in substance that on the 22d of February, 1893, it entered into a written contract with the appellant T. E. Holland, whereby said Holland agreed to purchase of it certain amounts of merchandise, and to use reasonable efforts to sell same, and appellee agreed to furnish same at specified prices for which said Holland was to pay cash for spring goods, July 1, 1893, and pay 1st of January, 1894, for goods ordered after 1st July, 1893. That pursuant to the contract appellant purchased of it, on 20th of August, 1893, goods, etc., as follows, to-wit:

100 bags fine ground bone at \$26 per ton.....\$260.00

50 bags Ohio Valley Phosphate at \$20 per ton.. 100.00

50 bags Phoenix Phosphate at \$18 per ton..... 90.00

of the value of \$450, which was delivered to appellant, Holland, for which he agreed to pay said sum on or before Jan- 1, 1894. That by the terms of the contract it was agreed that a failure of either party to comply with the conditions of the contract should be deemed sufficient cause for rescinding the same. Appellee further alleged that on —day of Sep-tember, 1893, Holland made a deed of assignment to ap-pellant Howell for the benefit of all his creditors; that said Holland is hopelessly insolvent and had transferred all his property to Howell, and that it will not pay over twenty-five cents on the dollar of his indebtedness, and has thus put it out of his power to comply with the contract made with plaintiff and pay said sum of \$450 on or before January 1, 1894, and asked that said contract be rescinded and the

goods above set out to be restored to them, and for proper relief. Appellants demurred to the petition, which demurrer was overruled by the court, and defendants failing to answer or plead further, judgment was rendered in plaintiff's favor for the recovery of the goods sued for, and from that judgment this appeal is prosecuted. A copy of the contract set out by appellee is filed as part of the petition. Appellee insists that the petition shows that Holland has put it out of his power to comply with the terms of the contract, although the debt would not be due until January, 1894, the petition being filed 25th September, 1893, and therefore appellee was entitled to have the contract rescinded, and also contends that a rescission of the contract entitles it to a judgment for the goods sold and delivered to appellant Holland.

The contract seems to have been carefully drawn so far as the interest of appellee is concerned. It is careful to provide that all goods left unsold at the close of the season shall be the sole property of the dealer, and that appellee shall not in any manner be expected to carry the same until the next season.

The contract also provides that not less than fifteen tons shall be ordered, all to be ordered during the year 1893. Also provides that appellee shall not be liable if it fails to fill all orders sent. Appellant was only allowed to sell in a certain locality or territory. There is no provision in the contract that the title to the property should remain in appellee, or that it in any event should have the right to take possession of the goods. We do not mean to say that such provisions would be enforceable if in the contract.

No fraud on the part of appellant is alleged; no lien on the goods was retained in the contract. It seems clear to us that the goods were sold and delivered to appellant Holland, and that the title passed to him. The rescission of

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the contract provided for could only have the effect to release appellee from obligations in the future, and could in no way affect transactions theretofore executed. For the reasons indicated, the judgment appealed from is reversed, and cause remanded with directions to the court below to sustain the demurrer, and for further proceedings consistent with this opinion.

CASE 69—PETITION EQUITY—MAY 10.

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APPEAL FROM JEFFERSON CIRCUIT COURT, CHANCERY DIVISION.

RIGHT TO SUE AGENTS OF STATE—INJUNCTION.—While an action nominally against an officer, but really against the State, to enforce performance of its obligation in its political capacity, can not be maintained, yet officers or agents holding and controlling property of the State may be enjoined from so using such property as to create a nuisance whereby the health or property of others will be injured.

In this case a petition against the Central Kentucky Lunatic Asylum alleging facts showing that two dams built by defendant across a creek which flows through the land which it holds for use of the Commonwealth create a nuisance resulting in injury to the health and property of plaintiffs, and asking the abatement of the nuisance, states a *prima facie* cause of action, and a demurrer thereto was improperly sustained, as not only does the act creating defendant a corporation make it liable in express terms to be sued, but it is answerable for the injury complained of independent of statutory liability, just as any natural person acting as agent or officer of the State would be liable.

ALFRED SELLIGMAN FOR APPELLANT.

1. The State has given ample authority to sue the Central Ky. Lunatic Asylum. (Constitution sec. 231; Kentucky Statutes, sec. 217;

97	458
108	359
97	458
e110	285
97	458
123	42
97	458
127	472
97	458
d131	291

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Frantz v. Jacob, 88 Ky., 525; Roberts v. City of Louisville, 92 Ky., 95; Pearson v. Zable, 78 Ky., 170; Kemper v. Louisville, 14 Bush, 87; Garrett v. Merriwether, 102 U. S., 511; Sinking Fund Comrs. v. Northern Bank of Ky., 1 Met., 175; Bain v. State, 86 N. C., 49; County Board of Education v. State Board of Education, 106 N. C., 83; Briscoe, et al v. The Bank of Commonwealth, 11 Pet., 257; Mobile Co. v. Kimball & Slaughter, 54, Ala., 57.)

Cases distinguished: Downing v. Mason County, 87 Ky., 209; Murdock &c., v. Commonwealth, 24 N. E. Rep.; Clark v. State and Bank of Tenn., 7 Cold, 307.)

2. The consent of the State is not necessary to authorize the court to enjoin the commission of or to abate a nuisance. (Kerr on Injunction, 181, 183, 505; Crawford v. Carson, 35 Ark., 565; Spelling on Extraordinary Remedies, p. 485, vol. 1; United States v. Lee, 106 U. S.; Poindexter v. Greenhow, 114 U. S., 287; Cunningham v. Mason &c. R. Co., 109 U. S., 455; Pennoyer v. McConaughty, 140 U. S., 1; Michigan State Bank v. Hastings, 41 Am., Dec., 549.)
3. Every action which indirectly affects the State is not within the prohibition of suits against the State. To sue an offending or derelict agent is not suing the State. (Adams v. Auditor, 13 B. M., 150; Gerrard v. Nutall, 2 Met., 106; Hailey v. Auditor, 4 Bush, 490; Trustees High School v. Auditor, 80 Ky., 333; Perkins v. Auditor, 79 Ky., 306; Lindsey v. Auditor, 3 Bush, 232; Auditor v. Cochran, 9 Bush, 7; Allen v. B. & O. R. Co., 114 U. S., 311; Poindexter v. Greenhow, 114, U. S., 287.)
4. The right to enjoin the pollution of a stream is established beyond controversy. (Hahn v. Thornberry, 7 Bush, 403.)

O'NEAL & PRYOR AND PHELPS & THUM OF COUNSEL ON SAME SIDE.

A. J. CARROLL, ALBERT S. BRANDEIS AND JOHN BARRET
FOR APPELLEE.

1. The appellee is an agent and arm of the State of Kentucky, and can not be sued without the express consent of the State. (Constitution of Kentucky, sec. 231; Kentucky Stats., sec. 223; Dartmouth College Case, 4 Wheaton, 668; Teneyck v. Canal Co., 3 Harrison, N. J., 200; Wheatly v. Mercer, 9 Bush, 707; Christian County v. Rankin, 2 Duv., 502; County of Lawrence v. Chattaroi R. Co., 81 Ky., 225; Greenup County v. Maysville, &c., R. Co., 88 Ky., 659; Downing v. Mason County, 87 Ky., 208; Hite v. Whitley County Court, 91 Ky., 168.)
2. The creation by the State of the corporation with power to sue and be sued can not be construed to be a grant of consent to sue

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- that, corporation for a tort. (Mason v. Rogers, 4 Litt, 377; Phillips v. Pope, 10 B. M., 173; Irish B. & L. Asso. v. Clemens, 78 Ky., 82; Rhodes v. Governor, 24 Texas, 496; Green v. State, 73 Cal., 29; Pollock's Admr. v. Louisville, 13 Bush, 221; Greenwood v. Same, 13 Bush, 226; Clark v. State of Tennessee, 7 Cold., 306; State v. Hill, 54 Ala., 67; Murdock v. Commonwealth, 24 N. E. Rep., 885, s. c., 152 Mass.; Williamson v. Louisville Ind. School of Reform, 15 Ky. Law Rep., 629; Benton v. Boston City Hospital, 140, Mass., 31; McDonald v. Massachusetts General Hospital, 120 Mass., 432; Haight v. The Mayor, 24 Fed. Rep., 93; Bryant v. City of St. Paul, 33 Minn., 289; Bigelow v. The Inhabitants of Randolph, 14 Gray, 541; Grainger v. The County of Pulaski, 26 Ark., 37; Sturner v. Board of Comrs., 38 Pac. Rep., 841; Hedges v. Madison County, 1 Gillman, (Ill.), 567; Elmore v. The Drainage Comrs., 135, Ill., 269; Hughes v. Monroe County, 79 Hun., 120.)
3. If appellee would not have been liable to an action in damages for the tort complained of it can not be commanded by a court of justice to abate a nuisance which constitutes the tort. (High on Injunctions, secs. 739, 1185; Story's Eq. Jur., sec. 925; Phoenix v. The Comrs. of Emigration, 12 How., Pr., 1; Fort Worth v. Crawford, 64 Texas, 202.)
4. The petition is not good because it affirmatively shows the action to be barred by limitation, or at least betrays such laches on the part of appellant as will preclude the relief sought. (Stillwell v. Leavy, 84 Ky., 384; Commonwealth v. Cook, 8 Bush, 224; St. Louis, &c., R. Co. v. Biggs, 52 Ark., 240; 20 Am. St. Rep., 174; Kinnison v. Carpenter, 9 Bush, 599; Logansport v. Uhl, 99 Ind., 531; High on Injunctions, secs. 884, 885; Trapagen v. Jersey City, 29 N. J., Eq., 206.)

JUDGE LEWIS DELIVERED THE OPINION OF THE COURT.

Mary Herr and others brought this action against Central Kentucky Lunatic Asylum, created by statute a body-politic, and in their petition state: That they are, as was their intestate husband and father, owners, in possession of and reside upon a tract of land containing about 300 acres, used as a farm and garden, through which flows a small water-course called Goose Creek; that adjacent to and above their land is a tract of about 400 acres, acquired and held by defendant for use of the Commonwealth, upon which have been erected at expense of the State, buildings

extensive enough to accommodate, and which do accommodate, about 1,000 persons, adjudged lunatics, besides about 100 attendants and servants; that defendant has wrongfully built across said creek two dams, making two artificial lakes or ponds, whereby the natural flow of water has been greatly diminished; that defendant dumps and causes to be carried through a sewer from said buildings into the creek all slops, offal and refuse matter of every kind, a large part, though, because of feeble flow of the creek, not all, of which passes through and upon the premises of plaintiffs, whereby water of the creek, formerly used for watering their animals and other farming purposes, has become unfit for any purpose, and the air rendered so noxious and offensive as to make their home unhealthy and untenable. Wherefore, they ask an injunction against defendant maintaining the alleged nuisance and abatement of it, including removal of the two dams.

But to the petition a general demurrer was sustained, upon the principal ground, as stated in opinion of the chancellor, and now urged in argument, that defendant corporation is but an arm of the State, and, consequently, can not be sued without express legislative authority. In terms of the statute creating defendant a corporation, it is not only given power to sue, but made, without qualification, liable to be sued. And if an action for the cause stated in petition of plaintiffs can not be maintained against it, we are at loss to know what character of default or wrong it could be sued for.

But it seems to us, independent of statutory liability, defendant is answerable for the wrong and injury complained of in the same manner, and to the same extent, as one or more natural persons would be, occupying the same attitude, which is that of agent or officer of the State.

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As a necessary consequence of exemption of the State from suit without its consent, an action nominally against an officer, but really against the State, to enforce performance of its obligation in its political capacity, can not be maintained. But if officers or agents of the State invade private right in a mode not authorized by the statute under which they claim to act, or if such statute is invalid, unquestionably the person injured has, at least, a preventive remedy, although the State may be affected by the proceeding, yet not a party to it.

As early as the case of *Osborne v. Bank of United States*, 9 Wheaton, 738, in which an injunction was sought against officers acting under statute of a State, the rule was thus stated by Chief Justice Marshall: "If the State of Ohio could have been made a party defendant, it can scarcely be denied that this would be a strong case for an injunction. The objection is that as the real party can not be brought before the court a suit can not be sustained against the agents of that party; and cases have been cited to show that a court of chancery will not make a decree, unless all those who are substantially interested be made parties to the suit. This is certainly true where it is in the power of the plaintiff to make them parties. But if the person who is the real principal, the true source of the mischief, by whose power and for whose advantage it is done, be himself above the law, be exempt from all judicial process, it would be subversive of the best established principles to say that the laws could not afford the same remedies against the agent employed in doing the wrong which they would afford against him, could his principal be joined in the suit."

The doctrine there stated has in numerous cases been since approved and applied by the Supreme Court, and this court has never held differently. For exemption of the

State from suit without its consent was intended for its own protection; not at all to enable agents or officers to do with impunity injury to private rights.

To say a court of chancery could not enjoin them entering upon and appropriating, without compensation, land of a private person, though done under color of statutory power, and in interest of the State, would be, indeed, a startling proposition. Yet so using property of the State as to create a nuisance, whereby such private person is deprived of use and enjoyment of his land, would be not less a wrong and injury than forcibly ousting him of possession and lawlessly taking and appropriating it. For while holding and controlling property of the State, its officers and agents can no more than a private person disregard the maxim "*sic utere tuo ut alienum non laedas*." It can not be that in such case a person injured would be wholly without remedy merely because the wrongdoers are agents or officers holding and controlling property of the State.

The case of *Williamson v. Louisville Industrial School of Reform*, 95 Ky., 251, recently decided by the court, is not like this, because there damages for a personal injury were sued for against, not the employe who committed the assault, but against the corporation, agent of the State, controlling the institution, which, if recovered, would have been payable out of the trust fund. Here the remedy sought is injunction against continuance of a nuisance, and, as necessary consequence, abatement of it. And as the alleged wrong is such as to cause permanent mischief and continuous grievance which can not be otherwise, than by injunction, repaired or prevented; and as it is moreover alleged plaintiffs have and will continue to suffer injury to both their health and property unless the court grants the relief, a

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prima facie cause of action is stated in their petition, and the chancellor erred in sustaining the demurrer.

Judgment is reversed and cause remanded for further proceedings, consistent with this opinion.

CASE 70—PETITION ORDINARY—MAY 11.

The Farmers' Bank and Trust Company, of
Stanford v. Newland.

APPEAL FROM LINCOLN CIRCUIT COURT.

1. **BANKS—NEGLIGENCE IN FAILING TO MAKE COLLECTION.**—In this action against a bank to recover damages on account of defendant's negligent failure to collect a certificate of deposit issued to plaintiff by another bank, and which plaintiff had placed in defendant's hands for collection, the plaintiff alleging that defendant had surrendered the certificate to the payor, the petition was defective in failing to allege any fact showing that the alleged negligence had caused plaintiff to lose his debt, there being no allegation that the defendant could have collected the amount of the certificate at any time after it received it for collection, or that the surrender of the certificate to the payor prevented such collection, or that the payor refused to surrender the certificate.
2. **SAME.**—When a customer deposits with a bank a note, bill of exchange, certificate of deposit or check, for collection at a point distant from the location of the bank, he does so with the implied understanding that the bank will follow the customary method in making such collection, which necessitates the selection of agents or correspondents at other points to carry out the undertaking, and the bank can only be held responsible for the exercise of due care and diligence in making such selection.
3. **SAME.**—Although the defendant may have been negligent in sending the certificate by mail directly to the bank which issued it, yet, as it received in payment the check of that bank, plaintiff has not been damaged, provided defendant would have had the right to receive the check through an officer or an agent whom it might have selected for the purpose.
4. **SAME—ACCEPTANCE OF CHECK IN PAYMENT.**—The defendant had the right to receive in payment of the certificate the check of the

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payor, the Pineville Banking Company, upon the Louisville Banking Company, that mode of accepting payment being in accordance with defendant's usage.

5. SAME.—Except by agreement or usage a bank has no right to take anything but money in payment of paper it holds for collection.
6. THE USAGE OF A BANK TO ACCEPT CHECKS IN PAYMENT of claims it holds for collection is binding upon a customer, whether he has knowledge of the usage or not, in the absence of any direction by him as to the mode of payment.
7. RIGHTS OF HOLDER OF CHECK—EFFECT OF ASSIGNMENT FOR CREDITORS.—A check drawn upon a bank is an absolute appropriation by the drawer of so much money in the hands of the banker to the holder of the check, to remain there until called for, and can not after notice be withdrawn by the drawer. Therefore, where the drawer, after drawing the check and before it is paid makes an assignment for the benefit of his creditors, the assignment passes to the assignee no interest in that part of the deposit thus appropriated, and the holder of the check may maintain an action upon it against the bank upon which it is drawn.

In this case the defendant having accepted in payment of plaintiff's claim, a check upon the Louisville Banking Company, which is solvent, and that company having refused payment for no other reason than that the Pineville Banking Company had, since the check was drawn, made an assignment for the benefit of his creditors, plaintiff has not been damaged, as he has a right of action against the Louisville Banking Company upon the check.

J. W. ALCORN FOR APPELLANT.

1. Even admitting that the answer of the appellant presented no defense, the petition of appellee would entitle him only to nominal damages, there being no averment that the certificate of deposit could have been collected at any time after the appellant received it for collection, nor that by reason of the surrender of the certificate or the failure to collect it the appellee has lost the amount thereof or any part of it. (Story on Agency, secs. 222, 236.)
 2. The appellant bank in undertaking the collection of the certificate of deposit for the appellee became his agent and was only bound for the exercise of reasonable care and diligence in the discharge of its assumed duties. (National Bank of Commerce v. Merchants' National Bank, 91 U. S., 92.)
 3. As the certificate was payable at and by a bank at a distant place, it necessarily follows that it was a part of the undertaking that the appellant should transmit the certificate to some corres-
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pondent for collection, that being the common custom and usage of banks in such cases. (Byrne v. Swing, 6 B. M., 199; De Laxardi v. Hewitt, 7 B. M., 697.)

4. "The liability of a collecting bank extends merely to the selection of a suitable and competent agent at the place of payment, and the transmission of the paper to such agent with proper instructions, and when that is done the correspondent is the agent of the owner of the paper, and the transmitting bank is not liable for the defaults of the correspondent when selected with due care." (Morse on Banks, 2d Edition, p. 414; Fabens v. Bank, 23 Pick., 230; Dorchester, &c. Bank v. N. E. Bank, 1 Cush, 177; E. Hadden Bank v. Scoville, 12 Conn., 203; Mechanics v. Earp, 4 Rawle, 384; Aetna Ins. Co. v. Alton Bank, 24 Ill., 243; Baldwin v. Bank, 1 La. An., 13; Daly v. Bank, 56 Mo., 91.)
5. Though the court should be of the opinion that the correspondent bank is not the agent of the owner of the paper, but is the sole agent of the transmitting bank, still the transmitting bank is not liable for the negligence or mistake of the sole agent, but only for its own fraud or negligence in the appointment, and in this case the appellant should not be held liable, there being no allegation in the pleadings of fraud in the selection of the correspondent. (Darling v. Stanwood, 14 Allen, 504; Taber v. Perolt, 2 Gall., 565; Kent v. Dawson Bank, 13 Blatch., 237.)
6. A check given by a bank immediately before making an assignment is an absolute appropriation of so much money in the hands of the bank holding the deposit to the holder of the check, and the assignee took only so much of the deposit as was left unappropriated after deducting the amount of the check. (Lester v. Given, &c., 8 Bush, 237; Armstrong v. Bank, 90 Ky., 431.)

W. G. WELCH FOR APPELLEE.

1. Where a bank receives the check of the party who is bound to pay the paper, placed in the hands of the bank for collection, and thereupon surrenders the paper to him, it assumes the responsibility for the check proving good; and if it is not paid, the bank is obliged to pay the amount to the person from whom it received the paper. (Morse on Banking, 2d Edition, 428, 429; Daniel on Neg. Inst., 3d Edition, vol. 2, sec. 1625.)
2. Where a collecting bank appoints sub-agents for the collection of the paper placed in its hands, it employs them as its own agents and is responsible for their acts. (Daniel on Neg. Inst., vol. 1, sec. 342.)
3. It is not sufficient that a custom exists, but it must also be reasonable, legal and prudent.

The custom relied upon by the appellant possesses none of these

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- necessary qualifications and no bank which, for its own convenience, observes it should be exonerated thereby. (Morse on Banking, pp. 415, 435, 439.)
4. A bank receiving a certificate of deposit for collection on another bank does not use ordinary business prudence and care in sending it direct to the bank making payment; and the transmitting bank should be held liable for any loss arising by reason of the selection of such agent (German National Bank v. Burns, 12 Colorado, 539; Morse on Banking, 415, 429.)
 5. The acceptance by appellant of the check of the collecting bank without objection and crediting appellee by the amount of same was a ratification of the transaction of said bank, and the appellant should be held liable for the payment of same. (Morse on Banking, 426; 2 Daniel on Neg. Inst., sec. 1625, 3d Edition.)
 6. The getting the money for the certificate was not only the "material portion" of the appellant's undertaking but the whole of it, and, upon the failure to collect the money on the check accepted, it should be held liable for the amount of same. (Daniel on Neg. Inst., sec. 335; Morse on Banking, 446.)
 7. The averments of the answer cure the defects in the petition. (Slack v. Lyon, 9 Pick., 62.)

JUDGE PAYNTER DELIVERED THE OPINION OF THE COURT.

By this action appellee sought to recover of appellant bank, damages for its alleged failure to collect a certain certificate of deposit which had been issued to him by the Pineville Banking Co. for the sum of five hundred dollars, and which he had delivered to the appellant bank for collection before the maturity of the certificate, which certificate matured on the 18th day of July, 1893. It is alleged in the petition that the appellant did not present the certificate of deposit until July 24th, 1893, "and that defendant on said day surrendered said certificate to the payor thereof, the said Pineville Banking Company, and negligently failed then and since to collect from said company the amount as aforesaid, of the certificate or any part thereof, and thereby plaintiff says he was damaged in the amount of five hundred dollars."

There is no allegation that the bank could have collected

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the amount of the certificate at any time after it received it for collection, or that the surrender of the certificate prevented such collection, or that the Pineville Banking Co. thereafter refused to surrender the certificate, nor are there any facts alleged which show the alleged negligence has caused him to lose his debt against the Pineville Banking Company.

For these reasons the petition was defective. However, as the judgment must be reversed, we will briefly consider other questions raised by the answer, to which a demurrer was sustained.

It is alleged in the answer that the certificate of deposit was given to it for collection in its usual course of business as a banker; that the certificate was received July 22, 1893, and that on the day it was received it was enclosed in a letter addressed to J. M. Pursifull, cashier of the Pineville Banking Company, which was duly stamped and mailed to him at Pineville, Ky., and in which he was requested to collect and remit proceeds to it; that the letter was received by him on the 23d of July, 1893, after banking hours, and on the next business day he presented the certificate at the office of the Pineville Banking Company for payment, when he received therefor the check of the Pineville Banking Company on the Louisville Banking Company, payable to the order of the appellant, for the amount of the certificate of deposit, and on receipt of which he surrendered the certificate of deposit to the Pineville Banking Company.

On the 28th of July, 1893, Pursifull enclosed the bank's check to the appellant, and it, in due course of mail, sent the check to appellant's correspondent at Louisville, Ky., for presentment and payment, which was accordingly done without delay, and the payment refused because the Pineville Banking Company had made an assignment for the

benefit of its creditors, this assignment being made between the time the check was sent to appellant and the time when it was presented for payment.

It is alleged that the Pineville Banking Company had much more money to its credit in the Louisville Banking Company, subject to check, than the amount called for by the check, and that the Louisville Banking Company is solvent.

It is further alleged that for many years it had been the general custom of banks in Kentucky that when a bank received from a customer for collection, a check or other claim on a bank in good standing, in a distant part of the State, and which was the correspondent of the transmitting bank, to send such check or claim directly to that bank, either with request for payment and credit of proceeds to the transmitting bank, or with request to remit proceeds, and if the request was to remit proceeds the correspondent bank would remit by its check on some bank in Louisville, or other commercial center, with which it had sufficient funds on deposit to pay the check; that the Pineville Banking Company was at the time the certificate of deposit was sent to its cashier and has always been in good financial repute; that the Pineville Banking Company was its correspondent at Pineville. It is contended by appellant that having received the certificate for collection it had the right to follow the custom of banks in making such collections, and send it directly to its correspondent with request that proceeds be remitted, notwithstanding the correspondent was the payor of the certificate, and further, that it had the right to receive in payment of the certificate, the check on the Louisville Banking Company.

In this country there is a great conflict in the opinions of the courts of several States on the question of the extent of

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the duty and responsibility of banks who receive a collection on a place distant from its place of business, and as to how far it is liable for the acts of its correspondents or sub-agents in the performance of their duties.

Some courts hold the transmitting bank is liable for any negligence or default of the agent or correspondent which it selects to make the collection. Other courts hold that the bank receiving a claim for collection in a place distant from the place where the bank is engaged in business can only be required to exercise due care and diligence in selecting a competent and trustworthy agent or correspondent, and if it exercises such care and diligence in making such selection, the bank is exonerated from all liability. We do not deem it necessary to analyze and discuss the various and conflicting decisions upon this question.

When a customer deposits with a bank a note, bill of exchange, certificate of deposit, check, etc., for collection at a point distant from the location of the bank, he must know the bank can not send one of its officers or agents to such point to make the collection. He is presumed to know the method employed by banks in making such collections. He knows that the bank must select some other bank or agency to aid in accomplishing the undertaking imposed on it. He has made the bank his agent for that purpose. He has employed the bank to do, through its methods of making collection, that which would cost him much time and money to do himself. When he so engages the bank and makes it his agent to make the collection, he does so with the implied understanding that the bank will follow the customary method in making such collections, which necessitates the selection of agents or correspondents at other points to carry out the undertaking, and the bank can only be held respon-

sible for the exercise of due care and diligence in making such selection.

If the appellant, in the course of its agency, had the right to present the certificate of deposit through one of its officers or through some agent at Pineville, and receive in payment thereof the check of the Pineville Banking Company on the Louisville Banking Company, then having presented the certificate of deposit and demanded payment by letter, thus obtaining the check in payment, it certainly would leave the parties in the same status in either state of case, because it might be admitted for the purpose of argument that the sending of the certificate of deposit to the Pineville Banking Company would be the selection of an agent to make the collection without due care and proper diligence; yet it having made payment of the certificate by check, which the appellant, through an officer or an agent, which it may have selected for the purpose, might have properly received in payment thereof, then it must necessarily follow that the appellee was not damaged because the certificate was presented and payment demanded by letter, and the check in payment was transmitted by mail.

In reaching this conclusion we must then determine whether the transmitting bank can receive a check of another bank in payment of a claim which it has assumed to collect at a point distant from the location of the bank.

If this can not be done, then the only course left for a bank to pursue is to send an agent to the point where the collection is to be made, or to have the bank or agent at that point send by express, or other means of transportation, the proceeds of the collection—the money. This is not regarded so safe by the most prudent business men as to transfer money through the medium of checks and drafts.

It is a cumbersome, and would be a most unsatisfactory,

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way to transact business. It is pleaded that it is the usage that banks remit collections so made by checks on a bank in Louisville or other commercial center, when the bank has on deposit money to pay such check.

In 1 Morse on Banks and Banking, Sec. 247, this language is used, to-wit: "Except by agreement or usage a bank has no right to take anything but money in payment of paper it holds for collection."

Sec. 221 reads as follows: "Knowledge of the usage, either expressed or implied, must, it has been said, be brought home to the parties who are to be bound by it. But other cases of high authority declare that the usage of the bank in collections will bind the persons dealing with it in this business, whether such usage be known to them or not; and this is certainly the correct rule. Indeed, the opposing cases can be easily reconciled by the link which appears to be suggested in one of them. The fact that one deals with the bank without taking the trouble to inquire as to its system will raise the implication that he already knows and is satisfied with that system. It is clear that if a person hand over a note to a bank for collection without any species of remark as to the course to be pursued, the bank is not bound to thrust upon him a statement of its intended course, and to retain him until the whole theory has been explained to him, when his conduct unmistakably shows that either he already knows it, or else he does not desire to know it. Either he knows and approves it, or he voluntarily trusts to the wisdom of the bank at his own deliberately assumed risk of its efficiency.

"In such a case the bank not only has the right to assume, but it is even positively bound to assume, that his desire is, that the ordinary and established usage be pursued. An unordered deviation from that usage, though the usage

was unknown to him, would lay the bank open to his suit for damages, and the court must, as has been already shown, rule for him, as matter of law, that the pursuance of the custom was an implied item of the contract.

"It is clear, then, that he could not plead ignorance of it, in order to lay a foundation for a suit against the bank for acting according to it. The knowledge on his part would be implied conclusively."

We conclude that the appellant had the right to receive the check of the Pineville Banking Company on the Louisville Banking Company, in payment of the certificate of deposit, which it held for collection, it being alleged, as heretofore stated, that the Pineville Banking Company had more money on deposit with the Louisville Banking Company subject to check than was necessary to pay the check. Under the decisions of this court in the cases of *Lester & Co. v. Given, Jones & Co.*, 8 Bush, 357, and *Buckner, Trustee, &c., v. Sayre*, 18 B. M., 745, a check thus drawn is an absolute appropriation of so much money in the hands of the banker to the holder of the check, to remain there until called for and can not, after notice, be withdrawn by the drawer.

Notice was given the Louisville Banking Company of the check, and this institution is solvent. The appellant tendered the check to the appellee, and being the real owner thereof could have maintained an action thereon against the Louisville Banking Company, as it had no right to withhold it.

The Pineville Banking Company by the check disposed of so much of its deposit with the Louisville Banking Company as was necessary to pay it, and it had no right and could not vest its trustee with any interest in that part of the deposit.

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In other words, the assignee acquired no greater interest in the deposit than his assignor had.

If the allegations of the answer as amended be true, then the appellee has sustained no damages for which he has any right of recovery against appellant.

It is said by Mr. Story in his work on Agency, sec. 236: "It is . . . a good excuse that the misconduct of the agent has been followed by no loss or damage whatsoever to the principal; for then the rule applies, that although it is wrong, yet it is without any damage; and to maintain an action both must concur; for *damnum absque injuria* and *injuria absque damno* are, in general, equally objections to any recovery."

The judgment is reversed, with directions that the demurrer to the answer, as amended, be overruled, and for proceedings consistent with this opinion.

CASE 71—PETITION ORDINARY—MAY 11.

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APPEAL FROM MONTGOMERY CIRCUIT COURT.

1. FIRE INSURANCE—CHANGE OF TITLE—RIGHTS OF MORTGAGEE.—

Where a policy of fire insurance provided that it should be void if any change should take place "in the interest, title or possession" of the property, "whether by legal process or judgment or by voluntary act of the insured or otherwise," a sale of the property under a judgment enforcing a mortgage lien and a conveyance to the mortgagee, who became the purchaser, constituted such a change in the title as rendered the policy void, although the mortgage was made with the consent of the company, and an indorsement was made by the company upon the policy that the

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loss, if any, was payable to the mortgagee, "as his interest may appear." The indorsement upon the policy gives the mortgagee no right to recover, as his interest as mortgagee has been merged in his perfect legal title, and he can have no greater right than the insured, as to whom the change of title renders the policy void.

2. **SAME.**—The fact that the mortgagee purchased under an agreement to allow the wife of the insured to redeem did not continue the policy in force for her benefit, she being a stranger to the contract of insurance.

A. A. HAZELRIGG AND C. C. TURNER FOR APPELLANT.

1. The assignment of an insurance policy creates and constitutes a new contract of insurance between the company and the assignee whereby the assignee becomes the beneficiary in the policy. (Insurance Company v. Allen, 14 Ky. Law Rep., 161.)
2. The consent of an insurance company to the assignment of a policy to one holding a mortgage on the insured property carries with it the implied consent that the mortgagee may, upon maturity of his debt, foreclose his mortgage lien, and, if necessary to protect himself, become the purchaser of the property without invalidating the policy.

J. J. CORNELISON ON SAME SIDE.

1. The petition of appellant stated facts sufficient to constitute a cause of action by setting forth:
 - (a) The execution and delivery by the company of the policy of \$1,000.
 - (b) The payment of the premium by the assured.
 - (c) The endorsement upon the policy by the company permitting the mortgage to be made, and its agreement in writing to pay the loss, if any, to the mortgagee.
 - (d) The total destruction of the house by fire during the life of the policy without the fault of appellants or any one.
 - (e) The waiver of the notice of loss by a denial of its liability by the company.
 - (f) That the interest of the appellant in the property was as great when it was destroyed by fire as before.
 - (g) That the building was of greater value than the face of the policy.
2. The words, as endorsed on the face of the policy, "loss, if any, payable to J. F. McKinney, as his interest may appear" entitle appellant to the insurance money, whether he be mortgagee or owner of the legal title.

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3. The endorsement was a waiver of the provision in the policy that the policy should be void in the event foreclosure proceedings were commenced, or the title should be changed by a judgment, sale and conveyance.

TYLER & APPERSON FOR APPELLEE.

1. The petition of the appellant was fatally defective in failing to state that he had the same interest in the property when it was destroyed by fire as when the endorsement was made on the policy, the allegation that his interest was "as great or greater" being insufficient to constitute a cause of action.
2. Under the provision of the policy that the whole policy should be void in case foreclosure proceedings were commenced, the institution of such proceedings and a sale thereunder and purchase by appellant renders the policy void, and the fact that the mortgagee was the purchaser can make no difference since he must stand in the same attitude as a stranger who may have been the purchaser. (*Manhattan Ins. Co. v. Stein & Zang*, 5 Bush, 569.)
3. The endorsement on the face of the policy, "loss, if any, payable to J. F. McKinney, as his interest may appear," had the effect only to substitute McKinney for the one originally assured, and he was bound by all the conditions and stipulations of the policy. (*Bergman &c., v. Commercial Assurance Co., of London*, 13 Ky. Law Rep., 772; *May on Insurance*, sec. 378.)
4. The title of the party originally assured having passed from him previous to the loss by reason of the sale under the foreclosure proceedings, he had no longer any insurable interest in the property, and, the appellant having forfeited his right, neither is entitled to recover.

JUDGE GRACE DELIVERED THE OPINION OF THE COURT.

On the 29th day of March, 1890, Jno. S. Parrish effected an insurance on his dwelling house, situated on a tract of land of one hundred acres, in Montgomery county, in the Western Assurance Co., Toronto, Canada, for one thousand dollars, for the period of three years from said date, and paid twelve dollars and fifty cents, the agreed premium on same, taking a policy in the usual form. This policy, however, contained many stipulations and conditions, limiting the liability of the defendant company, and among others, this one, that is now relied upon by defendant:

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"This entire policy, unless otherwise provided by agreement endorsed hereon, or added hereto, shall be void. . . if, with the knowledge of the insured, foreclosure proceedings be commenced, or notice given of sale of any property covered by this policy, by virtue of any mortgage or trust deed, or if any change (other than by death of the insured) take place in the interest, title or possession of the subject of insurance, (except change of occupants without increase of risk), whether by legal process or judgment, or by voluntary act of the insured or otherwise."

On the 9th of January, 1891, Parrish borrowed of his plaintiff, McKinney, the sum of three thousand dollars, and at the same time made to him a mortgage in due form of law, on this one hundred acre tract of land. This mortgage was made by and with the knowledge and consent of the insurance company, which at that time endorsed on the policy as follows:

"Loss, if any, payable to J. F. McKinney, as his interest may appear. A. HOFFMAN, Agent.

"January 19, 1891."

This mortgage debt not being paid, McKinney, in March, 1892, instituted suit to foreclose same on the land, and at the May term of the Montgomery Circuit Court, judgment was rendered, the land sold on the 16th day of May, 1892, and bought by McKinney for the amount of his debt, interest and cost. This sale was duly reported to the Montgomery Circuit Court, at its September term, 1892, and the sale confirmed, and on the fifth day of October, 1892, a deed was made by the commissioners of court, duly approved, to said J. F. McKinney, the purchaser. On the seventh day of October, 1892, the house was destroyed by fire, without any fault on the part of McKinney.

Application was duly made for the payment of the amount

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of the policy, \$1,000, which being refused, and the rights of McKinney or Parrish to this fund being denied, this suit was brought by them.

A demurrer was filed and sustained to the petition. An amendment was filed, stating that after the maturity of McKinney's debt, and finding that Parrish would be unable to meet same promptly, and while suit was pending, that McKinney and Parrish made an agreement that the suit should proceed, that judgment should be rendered, and that McKinney should buy this property, and that if Parrish or his wife, or any member of his family, chose to do so, and were able, that they should take up or secure this debt to McKinney and take and keep the property, this agreement being oral only. And plaintiffs say that after the sale and after the fire, Mrs. Parrish (who they say was always the beneficial and equitable owner) did make this arrangement in writing with McKinney, and that the policy of insurance was then for her use and benefit.

A demurrer was likewise sustained to the petition as amended, same dismissed, and hence this appeal.

Every policy of insurance is issued upon the express understanding and agreement, that the person insured is either the owner, legal or equitable, of the property insured, or at least that he has in some way a valuable and beneficial interest in same. This is of the essence or subject matter of the contract, many provisions being usually inserted to guarantee to the company the truth of this title, claim or insurable interest, and providing also that in case same is parted with, or in any way ceases to exist, before any loss, then the policy should cease and determine.

Such stipulations and provisions as these, being matters not of mere form, but of substance, and entering so clearly into the contract between the parties, the courts uniformly

uphold them. And the stipulation before quoted in this policy, providing that if the assured, Parrish, should in any way or manner, voluntarily part with the title to this property, or if same should be taken from him by judicial process, or by judgment of a court, before loss by fire, that then the liability of the company should cease, is valid and binding on the parties to this contract.

It is furthermore held by the courts quite generally, and we think correctly, that the property must remain the property of the insured; that whether there be a mortgage on it at the time the policy is issued, and a clause then inserted in the policy that in case of loss the insurance is to be paid to the mortgagee, or whether a mortgage be placed upon the property after the insurance is effected (with the consent of the insurance company), and an endorsement is then made by the company on the policy (as in this case), "that loss, if any, is payable to the mortgagee;" it is one and the same thing, the property remains the property of the original owner, and that there is no insurance by the mortgagee of his interest in it. Nor does the endorsement as made in this case transfer or assign the policy to the mortgagee, but the legal effect of the endorsement, "loss, if any, payable to the mortgagee," is only a contingent stipulation to so pay, or a contingent application by the company, with consent of the insured, that the money in case of loss shall be so paid.

And this interest of the mortgagee is further limited by the words, "as his interest shall appear," meaning, of course, his interest as mortgagee, not as owner. He must possess such an interest when the endorsement is made to make it a valid contract. And he must possess such an interest when the loss occurs, to entitle him by the plainest principles of his contract, and of the law, to recover.

And this right of recovery is also limited and made to de-

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pend further on the continuance and validity of this mortgage as between the insurance company and the insured (the owner) at the time of the loss. And the courts hold that this mortgagee must take notice of and is bound by the stipulations contained in the policy between the company and the owner. And that any act done or any change in the title made by the owner, whether voluntary or by judgment of a court, whereby the title to the property passes to another, destroys this right of the mortgagee to recover under this stipulation to pay to him in case of loss.

Some of these principles have been indicated and judgments announced thereon by this court in the following cases: *Bergman v. Commercial Assurance Co.*, 92 Ky., 494; *Manhattan Insurance Co. v. Stein & Zang*, 5 Bush, 659; *Home Insurance Co. v. Allen*, 93 Ky., 270.

Mr. May in his work on Insurance, sec. 378, quoting from the case of *Fogg v. Middlesex Mut. Fire Ins. Co.*, 10 Cush., 337, says: "There is another species of assignment, or transfer it may be called, in the nature of an assignment of a *chose in action*. It is this: 'In case of loss pay the amount to A. B.' It is a contingent order or assignment of the money, should the event happen upon which money will become due on the contract. If the insurer assents to it, and the event happens, such assignee may maintain an action in his own name, because, upon notice of the assignment, the insurer has agreed to pay to the assignee instead of the assignor. But the original contract remains, the assignment and the assent to it form a new and derivative contract out of the original. But the contract remains as a contract of guaranty to the original assured; he must have an insurable interest in the property, and the property must be his at the time of the loss."

We find it announced by Mr. Berryman, in his *Digest of*

Insurance Law, 687, that where a mortgagee insured his interest as such in a house, and afterwards foreclosed the mortgage and purchased the property, under the decretal sale, it was held that the purchase extinguished his interest as mortgagee, and that he could not recover for a loss which happened after the sale. In support of this he cites the case of *Gaskin v. Phoenix Insurance Co.*, 6 Allen (N. B.), 429.

In addition to these authorities we find a well-considered case from Maine, which we think directly in point, and from which we make the following extracts. It is *Brunswick Savings Institution v. Commercial Union Insurance Co.*, 68 Me., 314, decided June, 1878. We quote:

“On the 11th of September, 1874, Sophia B. Merrill was insured in the Narragansett Insurance Co. in the sum of five thousand dollars on her dwelling house, and on that day surrendered her policy and in lieu thereof took the one in suit from the Commercial Union Insurance Co., which was a re-insurance procured by the Narragansett Insurance Company. She had before that time mortgaged the house to the plaintiffs to secure the payment of thirty-five hundred dollars. The condition of the mortgage had been broken, and the plaintiffs had commenced proceedings for foreclosure, but defendant had no knowledge thereof. The foreclosure was perfected, and the title became absolute in the plaintiffs on the 24th day of July, 1875, before the loss. By a clause in the policy the insurance is ‘payable in case of loss to the Brunswick Savings Institution to the amount of mortgage held by them.’”

“The first specification of the conditions and stipulations in the policy, which are declared to constitute the basis of the insurance, among other things, contains the following: ‘Or if the property be sold or transferred, or any change

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take place in title or possession, whether by legal process or judicial decree, or voluntary transfer or conveyance, . . . then . . . this policy shall be void.'

"Under this policy, by the well-settled rule of law, Sophia B. Merrill is the assured. She was the general owner, had an insurable interest in the property, and paid the premium. The insurance was upon her property, and not upon the interest of plaintiffs as mortgagees."

A number of decisions are quoted to sustain this doctrine.

The opinion proceeds: "The clause in the policy, 'payable in case of loss to the Brunswick Savings Institution to the amount of mortgage held by them,' is not an insurance of the plaintiffs' interest in the property, nor an assignment of the policy to the plaintiffs. It is merely a contingent order or stipulation, assented to by the defendants, for the payment of the loss of the assured, if any, to the plaintiffs. It gives the plaintiffs the same right to recover that the assured would have if no such clause had been inserted in the policy. Any violation of the conditions and stipulations of the policy which would defeat the right of the assured to recover upon it, will defeat the right of the plaintiffs."

After citing other authorities the opinion continues:

"It remains to be determined whether the foreclosure of the plaintiff's mortgage was a transfer of, or change in, the title of the assured, within the meaning of the first condition and stipulation in the policy. Undoubtedly it was. When the policy was issued the assured had the general title. The plaintiffs' mortgage was an incumbrance. The foreclosure by the mortgagees was by 'legal process.' It was the process provided by law for the foreclosure of mortgages, and the extinguishment of the title of the mortgagors.

"When the provisions of the statute were complied with and the requisite time had elapsed, the mortgage, which before was an incumbrance, became absolute, and the alienation of the title of the assured became perfected. . . .

"It is not claimed that the defendants ever consented to the transfer of the title. By the foreclosure the assured ceased to have any title to, or insurable interest in, the property insured, and the policy thereby became void."

So, in this case on the 7th day of October, the time of the loss, McKinney had no interest in this property as mortgagee, which the defendants had contracted to protect. His interest as mortgagee had been merged in his perfect legal title.

Neither was Parrish any longer the owner. His right and title were then vested in another owner.

So, that, by the plain, unequivocal conditions and stipulations of the parties to this contract of insurance, as embraced in the policy, there was no longer existing either condition of the property, ownership or interest that defendant undertook to insure.

Neither do we regard it possible under and upon the conditions stated in the pleadings that Mrs. Parrish could have any insurable interest in this property at the time of the loss.. She was a total stranger to the contract of insurance in every way and manner.

We do not regard the conclusion we have reached discharging this insurance company from liability on the facts stated, as being at all on technical grounds, but on grounds forming the very basis and essence of the contract of insurance filed in the case.

Judgment affirmed.

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CASE 72—APPEAL TO CIRCUIT COURT—MAY 11.

Klyman v. Commonwealth.

APPEAL FROM WEBSTER CIRCUIT COURT.

1. JURISDICTION OF POLICE COURT.—The police court of a town of the sixth class, having jurisdiction concurrent with justices' courts in criminal and penal prosecutions, had no jurisdiction of this prosecution under sec. 1972 of the Kentucky Statutes against the owner of a pool table for the offense of permitting a minor to play pool on his table for compensation without the written permission of the parent of the minor, as the punishment of the offense is not "limited to a fine not exceeding \$100 or imprisonment not exceeding fifty days or both," but includes in addition to a fine of \$100 a forfeiture of "the right and privilege of again keeping such table," which is to be regarded as a part of the punishment in determining the question of jurisdiction.
2. APPEALS TO CIRCUIT COURT.—As the police court had no jurisdiction the circuit court should, upon appeal by the defendant, have dismissed the prosecution.

TOWERY & BOURLAND, WADDILL, NUNN & WADDILL AND
EDWARD W. HINES FOR APPELLANT.

1. The evidence fails to show that appellant *knowingly* permitted a minor to play on his pool table, and for that reason the judgment should be reversed.
2. The fact that the warrant was issued for Sebree City shows that the prosecution was for violation of a city ordinance, and therefore a judgment in favor of the Commonwealth under the State law was unauthorized. Besides, there is no evidence tending to show that Sebree City had any ordinance upon which to base the prosecution.
3. The police court of Sebree City had no jurisdiction of the offense because the punishment was not limited "to a fine not exceeding one hundred dollars or imprisonment not exceeding fifty days or both." (Kentucky Statutes, secs. 1093, 1972; Cheek v. Commonwealth, 87 Ky., 46; Johnson v. Commonwealth, 90 Ky., 53.)
4. The police court having no jurisdiction the whole proceeding was void, and the circuit court should have dismissed the prosecution for want of jurisdiction in the police court. (Robinson v. Commonwealth, 6 Dana, 287; Bassett v. Oldham, 7 Dana, 168; Howard v. Jones, 2 B. M., 526.)

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NOTE.—Points 3 and 4 were made for the first time in petition for rehearing, which was granted, the judgment having been affirmed upon the original hearing.

WM. J. HENDRICK, ATTORNEY-GENERAL, FOR APPELLEE.

The findings of the court upon the facts will be treated as the verdict of a properly instructed jury, and the facts being found, there can be no doubt that the judgment on the law follows.

JUDGE PAYNTER DELIVERED THE OPINION OF THE COURT.

No question was made in this case in the police court of Sebree City, where it was first tried, as to the jurisdiction of that court. No such question was raised in the circuit court to which an appeal was taken, nor was any suggestion made to this court by counsel that the police court had no jurisdiction of the prosecution. The question for the first time was raised by the petition for a rehearing. This court, therefore, did not consider the question.

Sebree City is a town of the sixth class. By sec. 3710, Kentucky statutes, police courts of towns of that class have jurisdiction concurrent with justices' courts in criminal and penal prosecutions.

By sec. 1093, Kentucky Statutes, justices have jurisdiction concurrent with circuit courts of all penal cases, the punishment of which is limited to a fine not exceeding one hundred dollars, or imprisonment not exceeding fifty days, or both.

This prosecution is under sec. 1972, Kentucky Statutes, whereby the appellant, the owner of a pool table, is charged with knowingly suffering and permitting for compensation a minor to play a game on his table, without the written permission of the parent of the minor. The person so offending "*shall be fined for each offense one hundred dollars, and shall forfeit the right and privilege of again keeping such tables.*"

It will be seen that the penalty for the offense is not only

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a fine of one hundred dollars, but the greater one in all probability of a forfeiture of the right and privilege of again keeping such tables.

We do not think the police court of Sebree City had jurisdiction of the offense charged.

In Cheek v. Commonwealth, 87 Ky., 42, it appeared that the accused was convicted on the charge of being bribed to vote at an election, and was fined fifty dollars, and by the statute under which the conviction took place, he was "excluded from office and suffrage." It was contended in that case that this court did not have jurisdiction, because under the provisions of the Criminal Code appeals are limited to cases of fines for over fifty dollars or imprisonment for over thirty days. The court held that as the judgment deprived the accused of a most sacred right, in being excluded from office and suffrage, therefore he had the right of appeal.

In Johnson v. Commonwealth, 90 Ky., 53, which was a prosecution under the same statute as in Cheek v. Commonwealth, the accused was fined ten dollars and excluded from suffrage and office. This court held that it had jurisdiction of the appeal for the reasons stated.

If in these cases this court had jurisdiction because the accused was deprived of a right in addition to the imposition of a fine, much less than the amount which gave the court jurisdiction, it must follow that, although the fine in the case at bar was no greater than by law the police court could impose, yet, as the effect of the judgment was to deprive the accused of his right and privilege of again keeping pool-tables, the penalty imposed by the statute was beyond the jurisdiction of the court.

The effect of the conviction was to deprive the accused of a franchise—a property right in addition to the fine im-

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posed. Therefore, we hold the police court of Sebree City did not have jurisdiction of the proceeding. If it had no jurisdiction the appeal to the circuit court did not give that court jurisdiction, and, therefore, it had no jurisdiction to enter a fine against the accused on such appeal, and should have dismissed the prosecution for want of jurisdiction in the police court. (Robinson v. Commonwealth, 6 Dana, 287; Bassett v. Oldham, 7 Dana, 168; Howard v. Jones, 2 B. M., 526.)

The rehearing is granted and the judgment reversed, with direction that the court below dismiss the prosecution.

CASE 73—PETITION ORDINARY—MAY 14.

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97	487
137	590
137	603

APPEAL FROM GRANT CIRCUIT COURT.

1. WHERE A NOTE IS SIGNED AND DELIVERED TO THE PAYEE WITH A BLANK, left apparently for the purpose of being filled with the place of payment, the payee has implied authority to fill the blank, and if he does fill it with the name of a bank and then negotiates the paper the maker will not be allowed to show as against a *bona fide* holder for value without notice of any infirmity in the paper that the payee had no authority to fill the blank.
2. SECOND APPEAL—RES JUDICATA.—In this action upon a note made "payable at the Bank of Williamstown," it having been held by the Superior Court upon a former appeal that a good defense was presented by an answer alleging that the word "payable" and the words, "the Bank of Williamstown" were inserted by the payee without defendant's authority or knowledge, after the paper was signed and delivered, and that it was not necessary for defendant to allege that plaintiff had notice of the infirmity in the paper, plaintiff bank had the right upon the return of the case to the lower court to plead by way of reply that it discounted the paper in good faith at the instance of the payee

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before maturity, without any notice of the fact that the blanks had been filled up by the payee or any one else, and that the paper when discounted was perfect as to date, amount and place of payment, the plaintiff not being precluded by the opinion of the Superior Court from making such a reply to the defendant's plea of non est iactum.

3. THIS CASE HAVING COME TO THIS COURT UPON A PETITION FOR RE-HEARING FILED IN THE SUPERIOR COURT, this court is not bound by the construction which the Superior Court in its opinion on this appeal placed upon its opinion on the former appeal, but the original opinion will be considered and construed as if it were an opinion of this court, or as if the Superior Court had not attempted to construe it.

W. W. DICKERSON FOR APPELLANT.

The circuit court disregarded the mandate and opinion of the Superior Court. By that opinion the Superior Court expressly held that it was not necessary for defendant to show that the bank had notice of the alteration at the time it purchased the note, and therefore, upon the second trial that question was *res judicata* and should not have been submitted to the jury. (Watson v. Avery, 3 Bush, 641; Scott v. Scott, 9 Bush, 175.)

GEO. C. DRANE FOR APPELLEE.

1. The issue presented upon the second trial was not the same issue adjudicated upon the former appeal. The Superior Court merely held upon the former appeal that *in the state of case presented* want of notice would not avail the plaintiff. The reply filed upon the return of the case presented an entirely different state of fact.
2. While the filling of blanks in a note contrary to agreement or authority of the party who left them is an alteration which can give the one who filled the blanks no rights against him who left them, yet it may bind him who left them to innocent holders for value. (2 Parsons on Notes and Bills, p. 566; Woolfolk v. Bank of North America, 10 Bush, 504; Blakey v. Johnson, 13 Bush, 205; Newell v. First Nat'l Bank of Somerset, 13 Ky. Law Rep., 775.)

CHIEF JUSTICE PRYOR DELIVERED THE OPINION OF THE COURT.

Cason executed his note to G. W. Siddons for two hundred

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dollars, payable in three months. The note, when executed, read as follows:

Dolls. 200

Williamstown, Oct. 2, 1889.

Three months after date I promise to pay to the order of G. W. Siddons, two hundred dollars,atvalue received.

Due

Chapman Cason.

The blanks were filled by inserting the word "payable" before the word "at," and the words "Bank of Williamstown, Ky.," after the word "at," making the paper "payable at the Bank of Williamstown, Ky." With these blanks filled by the holder he discounted the note before maturity at this bank, and Cason refusing to pay, the bank instituted the present action upon the note and recovered a judgment. It is alleged that the note was executed by Cason to Siddons, and transferred to the plaintiff (the bank) by Siddons for a valuable consideration, whereby the plaintiff became the owner, etc.

Cason filed an answer that in effect is a special plea of *non est factum*, alleging that a blank in the paper was filled in by Siddons, or some one else, by inserting the word "*payable*" before the word "at," and the words "*the bank of Williamstown, Ky.,*" after, so as to make the note read "*payable at the Bank of Williamstown, Ky.,*" that this addition to the note was made without his authority or consent and was wholly unauthorized by him. A demurrer was filed to the answer and sustained, on the ground, as is stated in the briefs, of the failure of the defendant to allege that the bank had notice of the infirmity of the paper when it became the owner. The case was brought to the Superior Court on the question raised by the demurrer to the answer, there having been a judgment for the bank, and the court reversed the judgment below upon the ground that the demurrer pre-

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sented a valid defense. On the return of the case to the lower court, the demurrer to the answer was overruled and a reply filed by the bank averring in substance that it discounted the paper in good faith at the instance of Siddons before maturity, without any notice of the paper's infirmity, or that the blanks had been filled up by Siddons, or any one else, and that the paper, when discounted, was perfect as to date, amount and where payable, that it is an innocent holder for value, etc. A demurrer was interposed to this answer and overruled, and it appearing that the paper had been discounted in good faith by the bank, with the blanks filled at the time, a judgment was again rendered for the bank. Cason then appealed to the Superior Court for the second time, and that court held that the question at issue had been settled by its decision on the first appeal, in which it held the answer of Cason to be good, in the absence of an averment that the bank had notice of the alteration in the paper, and the question being *res adjudicata*, the court below should have sustained the demurrer to the reply of the bank in which the circumstances under which it became the owner are specifically alleged.

It is plain the bank had been given no opportunity of showing the manner in which it held the paper, or its condition at the time the discount was made, and while the answer may be good, because it is simply a plea of *non est factum*, and although specially pleaded, the burden was on the bank, after the defendant had shown the alteration, of showing that it became the owner for value and without notice of the paper's infirmity.

It, therefore, became necessary for the appellee, the bank, to plead facts of which it must have the knowledge. Instead of requiring the defendant to present the bank's defense to the plea of *non est factum*. So, when the case went

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back with the demurrer overruled, the bank was compelled to reply, and the court could not have intended to say that the bank, although an innocent holder, was without any defense to the plea, although the reversal upon the second appeal would lead to this conclusion. The case, however, is now in this court on this second appeal and the case must be considered as if this court had rendered the original opinion, or rather, this court must determine whether the opinion of the Superior Court on the first appeal holding the answer good, precluded the bank from making the defense upon which the recovery was had. We adjudge not, for the reason already given. The bank, by its demurrer to the answer of Cason, admitted, because it had been so alleged, in that pleading, *that after Cason had executed the paper and delivered it*, it was, without his consent, fraudulently altered by the payee or some other person unknown to him, by inserting the words "*payable at bank of Williamstown.*" This admission made the answer good, and the exception to this doctrine, well recognized, must be pleaded by the holder, if innocent, for without the exception a want of notice constitutes no defense.

The exception is, "if the note have blanks left in it, filling the blanks is no alteration, but filling them contrary to agreement or authority of the party who left them is an alteration which can give the one who filled the blanks no rights against him who left them, though it may bind him who left the blank to other [innocent] holders for value." (2 Parsons on Bills and Notes, 566; Woolfolk v. Bank of North America, 10 Bush, 504; Blakey v. Johnson, 13 Bush, 197; Newell v. First Nat. Bank of Somerset, 13 Ky. Law Rep., 775.)

Where one signs a paper in blank, or partly in blank, when so written when signed and delivered as to show upon its face that a blank is left to fill up as to amount, or where payable, there is an implied authority to the holder to fill up

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the blanks in accordance with the general character of the instrument, and when this is done by the payee it is not such an alteration as will invalidate the paper as to one who takes it for value without notice of its infirmity.

In this case the paper had been discounted by the bank and placed upon the footing of a bill. It was taken as a complete instrument. Cason was in the bank and introduced Siddons, the payee, to its officers, and Siddons, no doubt, went to the bank for the purpose of discounting the paper. Cason, however, states the paper was not given for the purpose of being discounted, and there was no authority from him to fill up the blanks, and at last what the payor and payee understood in regard to the blanks, or the authority conferred upon the holder by an express agreement, is immaterial, as no such agreement is shown to have been made.

In the case of Cronkhite v. Nebeker, reported in 81 Ind., 319, where a note was executed in blank as to the place of payment, as in this case, it was held that no implied authority existed on the part of the holder to fill up the blank so as to make it negotiable. That case, it seems to us, is a departure from the well-recognized doctrine on the subject.

Mr. Daniel, in his work on Negotiable Instruments, says, "that when the drawer of a bill, or the maker of the note, has himself, by careless execution of the instrument, left room for any alteration to be made, either by insertion or erasure, without defacing it, or exciting the suspicions of a careful man, he will be liable upon it to any *bona fide* holder without notice, when the opportunity which he has afforded has been embraced." He proceeds to state, where after the word "at" a blank was left and it was filled and made payable at an unauthorized place, it was held that the word "at" implied that the blank space succeeding it might be filled

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before the note should be delivered with a designated place of payment. (2 Daniel on Negotiable Instruments, secs. 1405, 1406.)

In *Kitchen and others v. Place*, 41 Barb., 466, the blank space was left after the word "at" in a promissory note. The blank was filled designating the place of payment. It was held the holder had the implied authority to fill the blank.

In the case of *Redlich v. Doll*, 54 N. Y., 234 (13 Am. Rep., 573), the note was left blank after the word "at," no place of payment being inserted. The maker of the note delivered it to the payee upon the agreement that the note should not be negotiated, but the holder, violating the agreement, filled the blank and negotiated the paper. The court held the maker was liable to a *bona fide* holder for value. (See also *Brown v. Reed*, 79 Pa. St., 370.)

Many cases might be cited analogous to the one before us sustaining the judgment below, and we have no doubt of the appellant's liability to the bank.

Judgment affirmed.

CASE 74—INDICTMENT—MAY 14.

Gaskins v. Commonwealth.

APPEAL FROM JESSAMINE CIRCUIT COURT.

1. **FORMER JEOPARDY.**—A person is in legal jeopardy when he is put upon trial before a court of competent jurisdiction upon indictment or information which is sufficient in form and substance to sustain a conviction, and a jury has been charged with his deliverance; and a jury is said to be thus charged when it has been impaneled and sworn.
2. **SAME—DISMISSAL OF INDICTMENT FOR VARIANCE.**—The provision of sec. 178 of the Criminal Code that the dismissal of an indictment "for variance between the indictment and proof" shall not bar another prosecution for the same offense, does not apply where there was no dismissal of the indictment until after a trial and verdict, there being then no pending indictment to be dismissed. Therefore, appellant's plea of former acquittal in this case should have been sustained, although the former acquittal may have been due to a variance between the indictment and proof, there having been a verdict of not guilty in obedience to a peremptory instruction.
3. **AIDERS AND ABETTERS.**—Although appellant was proved on the first trial not to have himself done the killing, but aided and abetted another, he might have been legally convicted of the crime of murder for which he was indicted, and there was, therefore, in the meaning of the Code, no variance between the indictment and proof.
4. **ACCUSED PUT ON TRIAL IS ENTITLED TO DECISION.**—Having been put upon his trial under the former indictment on charge of murder by a jury sworn to decide the issue between himself and the Commonwealth, defendant was entitled to a decision of that issue, which he could not have been arbitrarily deprived of by the court.

JOHN H. WELCH FOR APPELLANT.

1. The acquittal of the appellant of the charge of murder in the indictment upon which he was being tried, was a bar to a prosecution under a subsequent indictment charging him with the crime of aiding and abetting another in the murder of which he had been formerly charged and upon trial acquitted. (*Benge v. Commonwealth*, 92 Ky., 1; Constitution, sec. 13.)

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2. Under the second indictment charging appellant with aiding and abetting in the murder of the deceased he might have been convicted of murder as charged in the first indictment upon sufficient evidence, and, therefore, he was put twice in jeopardy for the same offense in violation of the constitution. (Constitution sec. 13; *Thompson v. Commonwealth*, 1 Met., 15; *Triplett v. Commonwealth*, 84 Ky., 195; *Fisher v. Commonwealth*, 1 Bush, 211; 1 *Bishop's Criminal Law*, 685.)

WM. J. HENDRICK, ATTORNEY-GENERAL, FOR APPELLEE.

The indictment upon which appellant was tried and acquitted having charged him with having actually perpetrated the alleged murder of deceased, the trial under a subsequent indictment charging him with aiding and abetting another who was shown to have actually committed the murder is not a second jeopardy for the same offense within the meaning of the constitution. (*Kessler v. Commonwealth*, 12 Bush, 18; *Mickey v. Commonwealth*, 9 Bush, 593; *Bland v. Commonwealth*, 10 Bush, 622.)

JUDGE LEWIS DELIVERED THE OPINION OF THE COURT.

October 30, 1894, an indictment was found and filed against Milt Gaskins, for the crime of murder, committed, according to recital in the indictment, as follows: "That said Milt Gaskins, on the 30th day of October, 1894, in the county aforesaid and before finding of this indictment, George Perkins did unlawfully, wilfully, feloniously, and with malice aforethought, kill and murder Clay McClear, by shooting him with a pistol loaded with powder and leaden ball and other hard substance, and that Milt Gaskins was present and did unlawfully, wilfully, and with malice aforethought, aid, assist, counsel and advise the said George Perkins to commit the murder aforesaid." etc.

Under that indictment, Gaskins was, by the jury, found guilty of voluntary manslaughter, and his punishment fixed at confinement in the penitentiary for seven years.

The principal question to consider on this appeal is

whether the court below properly overruled the defendant's motion to dismiss the indictment and discharge him from custody upon the ground he has been acquitted of the offense charged in the present indictment, which was in due form pleaded.

In support of that plea was produced in evidence the following indictment, filed at October term, 1894: The grand jury of Jessamine county accuse Milt Gaskins, alias Milt Stigall, of the crime of murder, committed as follows: That said Milt Gaskins, alias Milt Stigall, on the 24th day of October, 1894, in the county aforesaid and before finding of this indictment, did unlawfully, wilfully, feloniously and with malice aforethought, kill and murder Clay McClear, by shooting him with a pistol loaded with powder and ball and other hard substance, etc." There was also put in evidence, record of proceedings under that indictment, showing, in substance, that the parties, Commonwealth of Kentucky, plaintiff, and Milt Gaskins, alias Milt Stigall, defendant, appeared, a jury was duly impanelled, and swore a true verdict to render; the trial progressed and plaintiff having concluded its case, defendant moved the court for a peremptory instruction, which was sustained, and thereupon the jury returned the following verdict: "We of the jury find the defendant not guilty as charged in the indictment."

As heretofore held by this court in case of *Williams v. Commonwealth*, 78 Ky., 93, "a person is in legal jeopardy when he is put upon trial before a court of competent jurisdiction, upon indictment or information which is sufficient in form and substance to sustain a conviction, and a jury has been charged with his deliverance; and a jury is said to be thus charged when they have been impaneled and sworn."

Sec. 178 Criminal Code provides: "The dismissal of the

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indictment by the court on demurrer, except as provided in sec. 169, or for an objection to its form or substance taken on the trial, or *for variance between the indictment and proof*, shall not bar another prosecution for the same offense." Sec. 169, referred to, provides that a judgment sustaining a demurrer because the indictment contains matter which is a legal defense or bar to the indictment, shall be final, and entitle the defendant to a discharge from any further prosecution for the offense. That section has, however, no application to this case. Consequently, it is necessary to consider only that portion of sec. 178 which provides that *dismissal of an indictment for variance between the indictment and proof shall not bar another prosecution*, being the ground upon which defendant's plea in this case was overruled.

Having been put upon his trial on charge of murder by a jury sworn to decide the issue between the Commonwealth and himself, defendant was entitled to a decision of that issue, which he could not have been arbitrarily deprived of by the court, nor was he, in fact, deprived of it; on the contrary, there was a decision by the jury, who, after hearing evidence and, under instruction of the court, rendered, in due form, a verdict of not guilty. And the only question to be determined is, whether the indictment under which he was so tried and acquitted was sufficient in form and substance to sustain a conviction if there had been a verdict to that effect.

Though there may be two or more persons charged with a murder, only one of whom actually did the deed, while the others were present, aiding and abetting, there is, in legal contemplation, but one offense, of which all or any one of them can be convicted as principals. *Benge v. Commonwealth*, 92 Ky., 1. It thus results that although appellant was proved, on the first trial, not to have himself done the

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killing, but aided and abetted another, he might have been legally convicted of the crime of murder, for which he was indicted, and there was really, in meaning of the Code, no variance between the indictment and proof. Moreover, there was no dismissal of the first indictment until after the trial was had and verdict of the jury was rendered, and then there was no pending indictment to be dismissed.

It seems to us the former trial and acquittal is a bar to the present prosecution, and appellant's plea ought to have been sustained.

Wherefore, the judgment is reversed, and cause remanded with direction to discharge him from custody.

CASE 75—INDICTMENT—MAY 15.**Commonwealth v. Bessler,****APPEAL FROM CAMPBELL CIRCUIT COURT.**

1. **KEEPING A DISORDERLY HOUSE** is a common-law offense, and to keep such a house is not an indictable offense unless it be laid as a common nuisance.
2. **SAME—INDICTMENT.**—The offense of keeping a disorderly house consists of a repetition of improper conduct, and to constitute a good indictment for that offense words must be used which show the repetition or frequency of the acts complained of, as that the acts were done on a day certain "and on divers other days and times," etc. It is not sufficient to allege that the acts were done "on the — days of —, 1894, and before the finding of the indictment."

WM. J. HENDRICK, ATTORNEY GENERAL, AND M. R. LOCKHART
FOR APPELLANT.

The averment in an indictment for the offense of keeping a disorderly house, that the acts alleged to have been committed were done "on the — days of —, 1894, and before the finding

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of the indictment," is sufficient to constitute a good indictment. (Bishop on Criminal Law, sec. 1119; *Smith v. Commonwealth*, 6 B. M., 21-23; *Wilson v. Commonwealth*, 12 B. M., 2; *Mallicoat v. Commonwealth*, 16 Ky. Law Rep., 359.)

BUTLER HAWKINS AND E. H. KILPATRICK FOR APPELLER.

1. The keeping a disorderly house is a nuisance, and the offense should be laid by charging that the acts complained of were continuous or habitual. (1 Duvall, 160; 4 Bibb, 261; *Greenbaum v. Commonwealth*, 10 Ky. Law Rep., 723.)
2. The charge in the indictment of a single offense is sufficient to constitute a good indictment for the offense of keeping a disorderly house. (*Smith v. Commonwealth*, 6 B. M., 21; *Wilson v. Commonwealth*, 12 B. M., 2.)

JUDGE PAYNTER DELIVERED THE OPINION OF THE COURT.

A demurrer was sustained to the indictment which charged the defendant, Bessler, with keeping a disorderly house, committed as follows: "The said Philip Bessler, on the days of, 1894, and before the finding of the indictment in the county aforesaid, did unlawfully suffer and permit a number of persons to assemble in his barroom at Fort Thomas, in the Highlands, the same being in his occupation and under his control, and there and then to drink to intoxication and to indulge in loud, boisterous and profane language to the common nuisance of the people then inhabiting. residing and passing and repassing, and in manifest destruction and subversion of and against good morals."

The question arising on the appeal is as to the sufficiency of the indictment. Keeping a disorderly house is a common law offense, and to keep it is not an indictable offense, unless it be laid as a common nuisance.

Common nuisances are created in various ways. One act of itself might not be common nuisance, except for that

which directly flows from it, and which is of a continuing nature.

The offense of keeping a disorderly house consists of a repetition of improper conduct. The form of indictment given by Chitty, charges that the offense was on a day certain and divers other days and times, etc. In the part of the indictment which described the acts constituting the offense it is said that the persons did "frequent and come together."

While the form of indictment which was in use under the ancient practice is no longer in use, yet the same acts which formerly constituted the offense are now required to be proved to convict one of the offense. There must be a frequency and continuity of acts which result in producing the disorderly house, hence the nuisance.

"When it was charged that the defendants assembled at a public place and profanely and with loud voice, cursed, swore and quarreled in the hearing of divers persons then and there assembled, whereby a certain singing school was broken up and disturbed *ad commune nocumentum*, it was held that the indictment could not be sustained as one for a common nuisance." (Archbold's Criminal Practice and Pleading, vol. 2, 995.)

In sec. 1449, Wharton's Criminal Law (9th ed.), it is said: "A disorderly house is a house kept in such a way as to disturb, annoy or scandalize the public generally, or the inhabitants of a particular vicinity, or the passers in a particular highway, and is indictable at common law."

In same work, sec. 1451, this language is used, viz.: "But that the house was *frequented* by noisy and disreputable persons without identifying them, may be put in evidence."

The latter quotation is used to show that the matter of repetition, or frequency of the acts of disorder, etc., is an es-

sential element in the acts to constitute the offense of keeping a disorderly house.

This view is further sustained by sec. 1106, Bishop on Criminal Law (7th ed.), *defining a disorderly house*, wherein he says it is "a house or other like place in which people *abide*, or to which they *resort*, disturbing the repose of the neighborhood."

In *Smith v. Commonwealth*, 6 B. M., 21, and in *Wilson v. Commonwealth*, 12 B. M., 2, the defendants were charged with certain acts occurring on a certain day "and divers other days and times," etc., and did cause and procure men and women "to *frequent* and come together," etc.

While in these cases the question was not raised as to whether the words just quoted were essential to make the indictments good, yet the court held that the acts alleged and proved constituted the offense of keeping a disorderly house and that the defendants were guilty because they *habitually* allowed the persons to assemble, etc.

There is an entire absence of any charge in the indictment that the defendant permitted persons to assemble, etc., on divers days and times, nor are there any words or phrases used charging a repetition or frequency of the acts of disorder, etc.

To say that the defendant is guilty of the offense of keeping a disorderly house committed "on the — days of —, 1894, and before the finding of the indictment," is not sufficient.

It is too indefinite, and does not use language charging a repetition of the acts in such way as to constitute the offense of keeping a disorderly house.

The judgment is affirmed.

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CASE 76—PETITION EQUITY—MAY 16.

American Association (Limited) v. Short.**APPEAL FROM BELL CIRCUIT COURT.**

1. **VENDOR AND VENDEE—FAILURE OF TITLE.**—Under a deed of general warranty reciting in one part that the land is to be paid for at a certain price per acre "on settlement of the acreage of a good title," and in another part that it is to be paid for "as soon as acreage of clear title can be determined so as to ascertain amount yet due," the vendee is not bound, as is the general rule in case of an executed contract of sale and purchase of land, to rely upon warranty of title and await eviction before resisting recovery of purchase money, but he has the right in this action to recover the purchase money, to make the issue and defeat the recovery in case the vendor does not show a good or clear title to the land sold, or to the extent he so fails.
 2. **PATENT TO LANDS IN TENNESSEE.**—While by compact between the States of Kentucky and Tennessee fixing the boundary line between them the State of Kentucky was to have title to and right to dispose of all the vacant land within a certain territory in the State of Tennessee, and the Legislature of Kentucky gave to some of the counties lying on the southern border vacant land situated within the territory mentioned, and authorized patents to issue on orders of county court of such counties, yet no such gift was ever made to the county of Bell, and the county court of that county, having no authority to make orders for location, survey or appropriation of the lands in controversy in this case which lie in the State of Tennessee, patents issued based upon orders of the county court of Bell county for such lands are void.
- CHAPMAN & SAMPSON FOR APPELLANT.**
1. The appellant can not be required to pay for any land except such as the appellee passes to it under good and clear title in Bell county, Kentucky, and not elsewhere. (5 L. R. A., 654: McGuire v. Kirk, 16 Ky. Law Rep., 87; Cates v. Loftus, 3 A. K. Mar., 202; Hart v. Bodley, Hardin, 106; Williams v. State, 64 Ind., 553; 95 Ind., 496; Davis v. Dycus, 7 Bush, 4; Bodley v. McChord, 4 J. J. Mar., 475.)
 2. The appellee's patents and deeds do not confer title to any lands other than in Bell county, Kentucky, and the attempt to appropriate land in Tennessee upon a warrant from the Bell county court must fail, and the survey and patent of land beyond the limit of Bell county are inoperative and confer no right or title.

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(Sutton v. Meuser, 6 B. M., 439; Bowman v. Eggner, 7 Bush, 69; Collins v. Clark, 8 Dana, 16; McMillan's heirs v. Hutcheson &c., 4 Bush, 615; Hart v. Rogers, 9 B. M., 418; McQuire v. Kirk, 16 Ky. Law Rep., 87.)

3. The stipulation of the deed of conveyance being that the appellant was to pay at a certain rate per acre for all the land to which appellee showed good title, appellant is not bound to rely upon its warranty of title but may resist recovery by appellee for any part of the land to which he failed to show title. (Acts 1835, page 307; Second Stat. Law Ky., 1028; Allen v. Sanders, 7 B. M., 593; Warvell on Vendors, vol. 2, pp. 927, 928; Runner v. Young, 14 Ky. Law Rep., 828; Wilson, &c. v. Suggett's executor, 10 Ky. Law Rep., 731; Mercantile Trust Co. v. South Park Residence Co., 94 Ky., 271; Howland Coal & Iron Co. v. Brown, 13 Bush, 687; Fitzhugh v. Croghan, 2 J. J. Mar., 429; Townsend v. Goodfellow, 3 L. R. A., 739; 5 L. R. A., 654.)

WILLIAM LOW FOR APPELLEE.

1. The appellant being in possession of all the land embraced in the deed and having never been disturbed or evicted, and there being no allegation or proof that the appellee practiced any fraud or that he is a non-resident or insolvent, the appellant can not resist the payment of the purchase price by showing defective title; nor does the fact that the deed contained a covenant of seizin have other effect. (Rawle on Covenants for Title, 293 & note; Hall's admr. v. Priest, 6 Dana, 13; 82 Ky., 282; 4 B. M., 415; 3 J. J. Mar., 582; 4 Mon., 73; 81 Ky., 608; 7 Mon., 202; Rawle on Covenants for Title, 263 note 1, 455.)
2. The stipulation of the deed that the remainder of the purchase price was to be paid at a certain rate per acre "on settlement of the acreage of good title" held by appellee was intended merely to fix the compensation for the land in which he could show good title as against his vendor, and the covenant of warranty in the deed must be relied upon and looked to for indemnity for land, the title to which was found to be in third parties.
3. A grantee in a deed containing a covenant of seizin is estopped from setting up the title in himself as constituting a breach of covenant. (Fitch v. Baldwin, 17 Johns, 166; Bebee v. Swartwout, 3 Gilman, (Ill.), 179; Furnace v. Williams, 11 Ill., 229; Horrigan v. Rice, 39 Minn., 49; 2 Herman on Estoppel, 821; 1 Warvell on Vendors, 425.)
4. The appellant having, after the conveyance from appellee to its trustee, purchased and received conveyances of portions of the

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land already conveyed to its said trustee, it can recover only nominal damages from appellee in the absence of any testimony as to what was paid therefor or what was a reasonable price. (2 Warvell on Vendors, 958; Harlow v. Thomas, 15 Pick. (Mass.), 69; Pate v. Mitchell, 23 Ark., 590; Mercantile Trust Co. v. South Park Residence Co., 94 Ky., 271; Vanmeter v. Griffith, 4 Dana, 89; Morgan's heirs v. Boon's heirs, 4 Mon., 297; 2 Warvell on Vendors, 924; Sampson v. Hawkins, 1 Dana, 303.)

W. H. YOST FOR APPELLEE IN PETITION FOR REHEARING.

1. The provision in the deed that the price to be recovered was to be determined by the "acreage of good title" held by the grantor does not change the accepted rule that whenever a grantee purchases outstanding claims he takes them in trust for the grantor, and if by such purchase his title to the land is perfected, the grantor may still recover the purchase price agreed to be paid, less the amount actually expended to secure such outstanding claims.
2. The opinion of the court permits the appellant to work a great injustice upon the appellee, since the former is allowed to retain possession of the land as against the latter without having paid him therefor, and in the face of the fact that the appellant failed to allege or to prove what sum had been paid to third parties for these outstanding claims, if anything.
3. The appellee having been in the unquestioned and undisturbed possession of the land at the time of the sale to appellant, he is at least entitled to have the contract rescinded and the possession again restored to him.
4. In holding that the grant from Bell county was void on the ground that that county had never been authorized to make such grants by the Legislature, the court overlooked the fact that the portion of Bell county in controversy was formed and taken from Whitley county, which was so authorized by the said body.

JUDGE LEWIS DELIVERED THE OPINION OF THE COURT.

In 1889, C. W. Short sold and conveyed by deed containing clause of general warranty to A. A. Arthur twelve distinct tracts of land.

In December, 1890, Short brought this action for judgment against Arthur for purchase money and enforcement of vendor's lien.

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In his answer Arthur stated the consideration failed because Short had no good title to the land; but that he, Arthur, had, when the deed was made, a title by purchase from others to a large part of it, and had since acquired title to other parts or tracts. He further stated he made the contract merely as trustee of American Association (Limited), which then had the beneficial interest, and, subsequently, that corporation became party defendant, and filed answer making the same defense Arthur had done.

Upon final hearing it was adjudged Short had good title to about 1762 acres of the twelve tracts conveyed by him to Arthur, and that he recover \$26,440, less what had been paid.

But the parties made an agreement, entered of record, in substance that defendant would abide by and not appeal from so much of the judgment as required payment at the contract price for 1128 acres, situated in the State of Kentucky, but would prosecute this appeal from that judgment to the extent it required payment at the contract price for 634 acres, situated in the State of Tennessee, plaintiffs agreeing no execution thereon should in meantime be issued.

It appears that in 1870, in consideration of twelve distinct orders from the Bell County Court, there was granted by the Commonwealth of Kentucky to J. H. Reno twelve distinct tracts, each described in the patent therefor, and also in each accompanying survey, as lying and being in the county of Bell, including the 634 acres ascertained and now agreed to be in the State of Tennessee.

In 1884, J. H. Reno, by deed, conveyed those tracts, referring to patents and surveys for description, to L. H. Reno, who, in 1888, conveyed same tracts, and in same manner described, to C. W. Short. And the main question in this

case is as to proper construction and meaning of the deed from Short and wife to Arthur for the same lands.

That portion of the deed necessary to be copied is as follows: "That the said parties of the first part for and in consideration of the sum of twenty-five hundred dollars to me in hand paid by the said party of the second part, the receipt of which is hereby acknowledged, and remainder to be paid for at the rate of fifteen dollars per acre *on settlement of the acreage of a good title, held by C. W. Short, under deed to him from L. R. Reno and wife of date August 6, 1888, recorded in Book 7, at p. 198, of records of Bell county, Kentucky, in six and twelve months equal payments as soon as acreage of clear title can be determined so as to ascertain amount yet due*, said six and twelve months to be computed from this date, have granted, sold and conveyed to said party of the second part the following described premises, to-wit, *situated in Bell county, Kentucky, to-wit, the land conveyed in said deed from Reno to Short being the land patented and granted by the State of Kentucky to J. H. Reno, as follows:*" Then follows reference to each patent and description and quantity of land in each tract.

It seems to us plain, from language of that deed, the parties intended the vendor should have right to demand and vendee be required to pay, at the agreed price of fifteen dollars per acre, for no more of the twelve tracts of land sold and conveyed than it was to be subsequently and on settlement shown or determined Short had a good title to. For if they had meant payment of, or obligation to pay, balance of purchase money should await or depend merely upon ascertainment by survey of the exact number of acres in the twelve tracts which by the survey were already ascertained and set out in the patents, there would have been no necessity for the words "*acreage of a good title,*"

used in one part of the deed, nor of the additional words "acreage of clear title." In fact, in language emphasized and not to be misunderstood, deferred payments were to be made as soon, but not before, "acreage of clear title" could be determined. Such being the true intent and meaning of the parties, the vendee was not bound, as is the general rule in case of an executed contract of sale and purchase of land, to rely upon warranty of title and await eviction before resisting recovery of purchase money. But he had the right in this action to make the issue and defeat recovery in case the vendor does not show a good or clear title to the land sold, or to the extent he so fails. Nor does the fact the vendee had at date of the deed title inferior to that of the vendor, to any part of the land, or that he subsequently acquired it, inure to benefit of the vendor, or give him a right to recover the purchase price, as is the general rule in case of executed contracts, because it was the plain meaning of their contract that Short was to have right to and Arthur was to pay for only the number of acres it was to be ascertained or determined the former had a good or clear title to.

By compact between the States of Kentucky and Tennessee the boundary line was fixed on what is called Walker's line, north of latitude 36 degrees, 30 minutes, contended for by the former, but it was to have title to and right to dispose of all the vacant land between the two lines, while the latter State was to have territorial jurisdiction.

The legislature had by statute given to some of the counties lying on the southern border, vacant land situated within the territory mentioned and opposite to them, and authorized patents to issue on orders of county courts of such counties. But no such gift had ever been made to the county of Bell, and the county court of that county had, con-

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sequently, no authority to make orders for location, survey or appropriation of the land in controversy on this appeal, which lie in the State of Tennessee. And, according to opinions rendered by this court in analogous cases, the patents issued to Reno, based upon orders of the county court of Bell county for such lands, are void, and neither Short nor his vendors ever acquired a clear or good title thereto. (Hart v. Rogers, 9 B. M., 419; McGuire v. Kirk, 16 Ky. L. R., 87.)

Moreover, the lands granted to J. H. Reno, under whom Short claims, purport to be, and are all described in the patents and orders of court under which they were located and surveyed as, situated in the county of Bell, State of Kentucky; not in the State of Tennessee at all.

As, therefore, the consideration failed to the extent it was agreed to be paid for lands situated in the State of Tennessee, plaintiff Short was not entitled to judgment therefor against either defendants Arthur or American Association, and it was error to render it.

The judgment is reversed and cause remanded for proceedings consistent with this opinion.

CASE 77—INDICTMENT—MAY 16.

Waller v. Commonwealth.

APPEAL FROM BARREN CIRCUIT COURT.

AN INDICTMENT CHARGING THE DEFENDANT WITH THE OFFENSE OF "PASSING COUNTERFEIT MONEY, knowing the same to be counterfeit, with the intention of circulating the same," alleged to have been committed by defendant by having in his possession and "passing a \$10 gold coin, knowing the same to be forged and counterfeit and with the intention of circulating the same," is fatally defective in failing to aver that such coin was in circulation, and also in failing to give any sufficient description of the coin so alleged to have been passed, the offense intended to be charged being that denounced by sec. 1181, Kentucky statutes, and not that denounced by sec. 1190 Kentucky statutes.

BAIRD & DICKEY and BOLES & DUFF FOR APPELLANT.

1. The indictment charging the appellant with the offense of passing counterfeit money, knowing it to be counterfeit and with the purpose of circulating same, was defective in failing to charge that the coin alleged to have been passed was one "passing as current in this State." (General Statutes, chapter 29, article 9, sec. 1.)
2. The indictment was also defective in failing to state by what nationality, government or authority the current coin was stamped and coined into money, and that the coin passed was a false likeness of the said current coin and was known to be so by the appellant. (Wharton's Criminal Law, page 594.)
3. The evidence of one who was not an expert as to the genuineness of coins, to the effect that the appellant had shown him a counterfeit coin similar to the one produced in court was incompetent.
4. The court below should have granted a new trial to the appellant on the ground of newly-discovered testimony as set forth in the affidavits filed.

WM. J. HENDRICK, ATTORNEY GENERAL, FOR APPELLEE.

The indictment against the appellant was found and returned under sec. 1190 of the Kentucky Statutes, which describes and defines the offense of "keeping in one's possession any counter-

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felt bank note or counterfeit gold, silver or other coin, knowing the same to be forged and counterfeited, with the intention of circulating same," and not under sec. 1181 as contended by counsel for appellant, and hence an allegation that the coin alleged to have been passed as counterfeit "passed as current in this State" was not necessary.

JUDGE GUFFY DELIVERED THE OPINION OF THE COURT.

This appeal is prosecuted by the appellant, John Waller, from a judgment of the Barren Circuit Court, rendered upon an indictment charging him with the crime of passing counterfeit money, knowing the same to be counterfeit.

Appellant demurred to the indictment, which demurrer was overruled, and, upon the first hearing of the prosecution, the jury failed to agree. A second trial resulted in a verdict of guilty, and fixing the punishment at confinement in the penitentiary for the term of five years. Appellant's motion in arrest of judgment, and motion for a new trial, having been overruled, he has appealed to this court. Several grounds are relied on in the motion for a new trial that need not be noticed. The indictment is in the following words: "The grand jury of Barren county, in the name and by the authority of the Commonwealth of Kentucky, accuse John Waller of the crime of passing counterfeit money, knowing the same to be counterfeit, with the intention of circulating the same, which was as follows, to-wit: Herebefore, to-wit, on the .. day of December, 1893, and in the county and Commonwealth aforesaid, the said John Waller did then and there unlawfully and feloniously have in his possession, and passing a ten-dollar gold coin to C. B. Whitney, knowing the same to be forged and counterfeited, and with the intention of circulating the same, and with the felonious intention to defraud the said Whitney, contrary to the form of the statute in such cases made and provided,

and against the peace and dignity of the Commonwealth of Kentucky."

It is insisted by the appellant that the indictment is fatally defective, while the appellee contends that it is sufficient, and that it was found under sec. 1190 of the General statutes, and suggests that appellant's assumption that the indictment was for the offense defined in sec. 1181, is erroneous. The charge in the indictment clearly imports a charge for passing counterfeit money, and the court below so understood it, as clearly appears from the instruction given. Sec. 1181, Kentucky statutes, provides, in substance, that if any person shall forge or counterfeit any gold, silver, or other coin, which is or hereafter shall be passing as current in this State, or shall, knowingly and falsely, utter, pay or tender in payment any such coin, he shall be confined in the penitentiary not less than five nor more than fifteen years.

The indictment in question is fatally defective in failing to aver that such coin was in circulation, and also in failing to give any sufficient description of the coin so alleged to have been passed. The indictment would not be good under sec. 1190, because no sufficient description of the coin was given, nothing by which the coin could be identified. The indictment does not state what government issued such coin, or by what authority, nor when it was issued.

In *Commonwealth v. Fields*, 5 Ky. L. R., 610, it was held that the averment "a counterfeit coin of the half dollar denomination, resembling the coin commonly called half dollar of the United States of America," was not a sufficient description of the coin. Also see 1 Wharton's Criminal Law, sec. 720, etc.

For the reasons indicated, the judgment of the court be-

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low is reversed and case remanded, with direction to set aside the judgment and verdict, and to sustain the demurrer to the indictment, and for further proceedings consistent with this opinion.

CASE 78—PETITIONS EQUITY—MAY 17.

Sherley v. Sherley, &c.
Ewing, &c v. Sherley, &c.

APPEAL FROM JEFFERSON CIRCUIT COURT, CHANCERY DIVISION.

1. PAROL TRUST.—When a father buys and pays for land taking a conveyance to himself, declaring by parol that he holds the land in trust for his son, whom he allows to occupy it as a home, but dies leaving a will devising the land to others, the parol declarations of the father do not create an enforceable trust in favor of the son or his heirs.
2. AN INTEREST IN PERSONALTY MAY BE GIVEN BY PAROL, or one may undertake by parol to stand seized to the use and benefit of another as to personal estate. And the rule that actual possession must accompany the gift is not of universal application.
In this case an interest in a mercantile firm is held to have passed by parol gift.
3. COMMISSIONS OF ADMINISTRATOR AND GUARDIAN—SET-OFF.—Where no commissions had ever been allowed to one who acted as administrator of his son and guardian of his grandchildren, and the wards after many years sought to surcharge his settlements as administrator and guardian, it was proper to allow him, or his personal representative, to set-off his commissions against any items established against him as administrator or guardian.

SIMRALL, BODLEY & DOOLAN FOR APPELLANTS.

1. Lewis Sherley at his death had never completed a gift to Bowen of any interest in the firm of Sherley, Woolfolk & Co. It is essential to the validity of a gift *inter vivos* that there should be a delivery to the donee, and that the property or thing given should immediately pass and be irrevocable by the donor.

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- (Duncan v. Duncan, 5 Litt., 12; Walden v. Dixon, 5 Mon. 170; Knott v. Hogan, 4 Met., 102; Payne v. Powell, 5 Bush, 252.)
2. It is the duty of a court of equity to compel Z. M. Sherley's estate to account to Lewis Sherley's estate for his entire interest in the assets of the firm of Sherley, Woolfolk & Co. The law treats the surviving partner as a trustee for the benefit of the deceased partner's estate as well as creditors, and if he is guilty of either negligence or delay a court of equity will interfere; and in such case it is the duty of the personal representative of the deceased partner to apply to the court to compel the survivor to properly administer the trust and close up the estate; and if he fails to do this he is equally culpable with the survivor. (Parsons on Partnership, pp. 442, 445.)
 3. A parol trust in land may be enforced. (Williams v. Williams, 8 Bush, 241; Griffin and wife v. Coffey, 9 B., Mon., 452; Martin v. Martin, 16 B. Mon., 8; Miller's heirs v. Antle, 2 Bush, 408; Green v. Ball, 4 Bush, 586; Crutcher v. Muir's exor., 90, Ky., 142; Graham v. King, 96 Ky., 339; 1 Perry on Trusts, sec. 75.)
 4. When a final settlement is made by an administrator or guardian without any claim for commission the court will not permit the matter to be opened up again for that purpose. (Matter of estate of Edward O'Neil, 46 Hun., 500; May v. Corliss, 68, Ala., 135; Swanson v. Phillips, 21 N. J. L., 70; Ten Broeck v. Fidelity Trust & Safety Vault Co., 88 Ky., 242; James v. O'Driscoll, 2 Ray, S. C., 101.)
 5. The claim to commissions is barred by limitation, over fifteen years having run since the settlements were made and only five being necessary to bar.

P. B. & UPTON W. MUIR ON SAME SIDE.

1. None of the claims sued for were barred by the statute of limitation or by laches. (Ky. Statutes, sec. 2521.)
2. As the seventh section of the Statute of Frauds has never been enacted in Kentucky, a parol agreement to hold land in trust is enforceable. (Miller v. Thatcher, 9 Texas, 482; 16 Texas, 262; 19 Texas, 102; 6 Wall., 116; 5 Jones' Equity, 292; 6 Humph., 99; 8 Humph., 460; 4 Sneed, 705; 7 Leigh, 576; 2 P. & H., 549; Crutcher v. Muir's exor., 90 Ky., 144; Graham v. King, 96 Ky. 339; Curd v. Williams, 13 Ky. Law Rep., 855; Monarch v. Jones, 8 Ky. Law Rep., 612; Bedford v. Graves, 8 Ky. Law Rep., 262; Williams v. Williams, 8 Bush, 241; Griffin v. Coffey, 9 B. Mon., 452; Martin v. Martin, 16 B. Mon., 8; Green v. Ball, 4 Bush, 590; 13 Ky. Law Rep., 365; 6 Ky. Law Rep., 309; 7 Ky. Law Rep., 294; 4 Ky. Law Rep., 364; 2 Bush, 408; 16 B. Mon., 14; 9 B. Mon., 452; 13 Ky. Law Rep., 824; 10 Ky. Law Rep., 92.)

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3. Even if a writing was necessary, the memorandum made by the agent of Capt. Sherley at his request, and afterwards ratified by him, is sufficient to take the case out of the statute. (*Elliott v. Elliott*, 15 Ky. Law Rep., 274.)
4. The checks which read "Pay to L. A. Sherley, repairs," are sufficient to satisfy the requirements of the Statute of Frauds. (*Miller v. Antle*, 2 Bush, 407; *Wood on Statute of Frauds*, p. 649.)
5. There was not a valid gift to Bowen of Lewis Sherley's interest in the firm of Sherley, Woolfolk & Co. (*Payne v. Powell*, 5 Bush, 252; *Duncan's admr. v. Duncan*, 5 Litt., 12, 13; 8 Am. and Eng. Enc. of Law, 1313, 1315.)
6. Z. M. Sherley having made his final settlement without charging commissions can not now do so. (*Reynolds v. Reynolds*, 13 Ky. Law Rep.; *Ten Broeck v. Fidelity Trust & Safety Vault Co.*, 88 Ky., 242.)

C. B. SEYMOUR ON SAME SIDE.

1. The Statute of Frauds is not in force here by reason of its enactment in England. (*Searcy v. Major*, 4 Bibbs, 96.)
Therefore, as sec. 7 of the statute has never been re-enacted here, it is not in force here.
2. A trust for value may be treated as a sale. (*Chiles v. Woodson*, 2 Bibb, 71; *Parker v. Bodley*, 4 Bibb, 102.)
3. A trust may be created of lands in this State without a writing. (*Green v. Ball*, 4 Bush, 591; *Myles v. Myles*, 6 Bush, 245; *Faris v. Dunn*, 7 Bush, 276; *Caldwell v. Caldwell*, 7 Bush, 515; *Hobbs v. Wilcox*, MS. Op., 1881.)
4. While as a rule an equity resting on a merely meritorious consideration will not be enforced against an heir, who is unprovided for, yet in the case at bar appellees are well provided for and therefore the relief should be granted. (*Garner v. Garner*, 1 Bush, Eq., 1; *McIntire v. Hughes*, 4 Bibb, 187; *Buford v. McKee*, 1 Dana, 108; *Mahon v. Mahon*, 7 B. M., 579.)
Cases explained: *Rucker v. Abell*, 8 B. M., 566; *Spears v. Sewell*, 4 Bush, 239; *Usher v. Flood*, 83 Ky., 552.

HUMPHREY & DAVIE, JOHN W. BARR, JR., FOR APPELLEES.

1. The proof shows that Captain Z. M. Sherley paid for the country place, and does not show that he gave it to his son Lewis. A verbal promise by the father to give the farm to his son, without valuable consideration, even if proved, would have been within

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the statute of frauds, and not enforceable. The doctrine of "part performance" taking a case out of the statute of frauds, does not prevail in Kentucky. (General Statutes, chap. 22, sec. 1; chap. 24, sec. 2; Perry on Trusts, sec. 134, 137; Am. & Eng. Ency. Law, vol. 10, p. 12; Grant v. Craigmiller, 1 Bibb, 205; Rucker v. Able, 8 Ben. Mon., 566; Spears v. Sewell, 4 Bush, 239; Usher v. Flood, 83 Ky., 560; Commonwealth v. C. & O. R. Co., 14 Ky. Law Rep., 682.)

2. The proof shows that Lewis Sherley gave to Bowen one-fourth of his interest in the firm of Sherley, Woolfolk & Co.; and a correct calculation of the various items shows that whatever sums Captain Sherley had, as administrator of Lewis, received from the firm, were fully accounted for, in his settlements. The parol gift by Lewis to Bowen, or an interest in the firm, is sufficiently shown by the evidence. (Williamson v. Yeager, 91 Ky., 284.)
3. Captain Sherley, as administrator of Lewis, had no right or power to collect the debts or other assets of the firm; this being the exclusive right and duty of the surviving partner, Woolfolk; and the administrator is not liable for any negligence of the surviving partner in failing to collect them. (Lindley on Partnership, side page 440; Wilson v. Soper, 13 B. M., 411; Shields v. Fuller, 65 Am. Dec., 293, 298.)
4. If there had been any duty on the administrator to collect the assets of the firm, there was no duty to bring suit against debtors where there was no likelihood of making the debt; and the administrator would only be liable where his failure to bring suit was from bad faith or from wilful default or fraud. (Thompson v. Brown, 4 Johnson's Ch., 619; Thomas v. White, 3 Litt., 184; Read v. Perry, 1 Monroe, 256.)
5. The other items sued for are unsupported or disproved by the evidence; and, if they were allowed, they would not equal the amount of commissions which Captain Sherley was entitled to, as administrator. As he expressly reserved in his settlements the right to charge commissions if he saw fit, such commissions can now be used as a set-off against these demands. (Albro v. Robinson, 93 Ky. 200; Fidelity Co. v. Ten Broeck, 88 Ky., 242.)

JUDGE GRACE DELIVERED THE OPINION OF THE COURT.

Z. M. Sherley, the father of Louis A. Sherley, who was the father of appellants, Brannin C. Sherley and Bettie Sherley Ewing, on the 12th day of May, 1869, bought of Mrs. Sarah F. Wingate, a small tract of land of fourteen acres, lying some three miles from Louisville on the Shelbyville pike,

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and on which was a commodious brick dwelling house, at the price of ten thousand dollars, paying one-third of the price cash and executing his notes to her for the deferred payments, and taking a deed of conveyance, with general warranty of title to himself for the land.

He retained this legal title in himself, until his death, about March, 1879, and by his will, duly executed a short time before his death, gave it, as a part of his estate, to be equally divided between his three sons, Thomas Sherley, John Sherley and Douglass Sherley. These parties held this property until 1886, when by deed of partition of the estate of their father, this tract of land was conveyed to Thomas Sherley, or possibly to his wife and children (the deed not being in the record), who is now in possession, claiming title to same.

On the fifth day of September, 1886, Brannin Sherley and Bettie Sherley, children and only heirs at law of Louis A. Sherley, deceased, filed this bill in chancery, in the Jefferson Circuit Court, claiming an interest in the property, and relying on two grounds for recovery. First, they say that their father, Louis A. Sherley, paid the purchase money, being \$10,000, for the property, and that, therefore, it was held in trust for their father and for them.

Secondly, reaffirming the payment of the purchase money by their father, say that it was held in trust by Z. M. Sherley for their father, and that this trust was evidenced by writing, signed by Z. M. Sherley, which writing, going into the hands of Z. M. Sherley, who qualified as the administrator of their father, and afterwards as their guardian, has been destroyed, lost or mislaid.

By an amended petition filed later, they say that by agreement between their father, Louis Sherley, and Z. M. Sherley, the latter undertook and agreed to buy this

property for their father, Louis A. Sherley, and that he did so buy it for him; and that his holding the legal title up to the time of his death was in trust for their father, and for them after their father's death, and that the defendants, as devisees of Z. M. Sherley, held it in the same way until in 1886, when by deeds of partition this place fell to Thomas Sherley. They pray for a judgment against the executor of Z. M. Sherley and his devisees for the sum of ten thousand dollars and interest, or for the recovery of the tract of land aforesaid. These allegations were each and all specifically denied.

Under the issues formed, it is quite clear from the evidence in the cause that Louis A. Sherley did not pay any part of the purchase money for this land, but that same was paid in full by Z. M. Sherley, out of his own funds. Neither is it established that at any time there was ever any writing signed by Z. M. Sherley in any way or manner, declaring or recognizing this trust in favor of his son, Louis A. Sherley, the evidence offered by the appellants being wholly insufficient for that purpose, or even to raise any reasonable presumption that any such writing ever existed. These two allegations relied upon to show title in the ancestor of appellants being out of the way, it remains only to examine the third ground relied on by appellants, and its validity under the law; and whether, if established by parol only, it is sufficient to entitle appellants to recover either the ten thousand dollars claimed, or the land itself.

Plaintiffs establish, as we think, beyond any doubt, that at the time, and before, the purchase of this tract of land, Z. M. Sherley was, for prudential reasons, and looking to a less expensive mode of life by Louis A. Sherley and his family, anxious to have them removed from the city of Louisville, where they lived, and locate in the country, and

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that he selected and purchased this place as a home for them, and induced them to remove to the same and make it their home, which they did, until June, 1871, when the wife of Louis A. Sherley died, Louis A. Sherley retaining possession, however, after that time until his own death, on December 25, 1872.

Z. M. Sherley often declared his purpose to do as above stated. So stated to Mrs. Wingate at the time he bought the property and the reason for same. That he always spoke of it during Louis Sherley's life as his home. Said he intended to give it to him, said he had given it to him, and after his son's death said that it was his son's, but that he had never conveyed it to him, but now that he was dead he intended to convey it to his children, Brannin and Bettie Sherley. That for the year 1873 he rented this property out by parol agreement, stating that it belonged to the children of his son, Louis Sherley.

So that the legal question presented by these facts is whether an enforceable trust can be established by parol only, so as to compel a father or grandfather, who has bought and paid for a tract of land, and taken a deed in his own name, to execute a conveyance of the title, in pursuance of such parol declaration, or whether the court, after his death, can, on this state of fact, compel the devisees of the deceased grandfather to make compensation to these appellants equal to the value of this property, the grandfather having, as seen before, retained this property, and the deed for same, until his death in 1879, and by his will given it to his surviving sons.

On consideration we do not believe such a trust on the facts in this case can be enforced in Kentucky.

While there are many states of case that have arisen wherein this court has declared and enforced a parol trust

in real estate, yet no case has been found coming up to the facts in this case where such a ruling has been made.

There are many cases cited by appellant's counsel where the property of some previous owner was about to be sold, either under execution sale or by a commissioner, under a decree of a court, where the owner may contract and has contracted either with his debtor or with some other person (a stranger), to buy this property for him and to take and hold it until the owner can repay him his money and interest, and where under such a contract, though only in parol, the property is sold and bought and an absolute deed made by the sheriff or by the commissioner, and where possession may accompany the title. And yet the court will recognize and enforce the trust, and will declare the purchaser and all holding under him with notice to be holding only in trust. And on the repayment of the purchase money and interest, will compel a reconveyance of the land to the original owner. The courts hold that such a transaction is not within the letter or spirit of the statute of frauds, which is generally relied upon by the holders to avoid the trust. This class of cases constitutes the bulk of the cases cited by appellants, yet there are other cases cited where the doctrine has been applied.

In *Faris v. Dunn*, 7 Bush, 276, a married woman relinquished dower in a five hundred acre tract of land, upon condition only that her unmarried daughter should have one hundred acres of the land, or its value, \$10,000. The husband sold the land to his son-in-law, and, subsequently, bought with the money for his daughter a hundred acre tract of land selected by her, but took the deed to himself, and some years afterwards mortgaged this land to another, who had notice of the agreement. Held by the court that this land was held in trust and the title of the daughter es-

established against the mortgagee. Here there was a valuable consideration passing to the husband and father and invested in this land—widely different from the case at bar.

In the case of *Caldwell v. Caldwell*, 7 Bush, 515, a father, having provided for his children, yet devised to five of them a tract of land of three hundred acres, upon an oral declaration only, that if his other son, James, returned from the war, and was capable of holding title to this land, that they should convey it to him. This trust was enforced by the court. A valuable consideration or property had passed from the father to the devisees.

In the case of *Hobbs v. Wilcox*, manuscript opinion, October 17, 1881, substantially the same line is followed.

The case of *Williams v. Williams*, 8 Bush, 241, is relied upon by appellants. In that case the same state of case existed as in many others cited.

Williams, Jr., owned a valuable tract of land adjoining the city limits of Louisville, and having both family and financial troubles, this land in different parcels was sold, some by execution and some by commissioner's sale, and either bought directly by *Williams, Sr.*, or the bids of others taken up by him, all under a parol agreement, as found by the court, to hold for the benefit of *Williams, Jr.*, until his money and interest was repaid. The land was worth fifteen to twenty thousand dollars; the whole advances made in the way indicated by *Williams, Sr.*, did not exceed some ten thousand dollars. The court enforced the trust. But there is no similarity between that case and this one.

On the other hand a number of cases are cited where the court says the trust can not be enforced.

In the case of *Usher's Ex. v. Flood*, 83 Ky., 552, where Usher not being of any blood relationship to Flood, yet

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taking a fancy to him, treated him as a child, and told him if he would get married he would give him a lot and build him a house. Flood did marry. Usher built the house, and put him in possession, yet when Usher died his heirs filed suit and recovered the property, the court holding that there was no consideration, either good or valuable, for the promise, and that as a parol gift it could not be sustained against the statute of frauds.

In *Speers v. Sewell*, 4 Bush, 239, a father having provided for two of his sons by conveyances to them, induced another son to come and live with him, promising him the home place by parol agreement only. Held not enforceable. The court said: "As there was no written memorial of the contract for the conveyance of the homestead land to the appellant John, he could not, by suit, enforce a specific performance." The statute of frauds barred his recovery.

In *Rucker v. Abell*, 8 B. M., 566, the court said: "A verbal gift of land is wholly invalid. It vests no right in the donee, legal or equitable. The donor still has the power to consummate the gift or not at his option. Being voluntary at its commencement, it is no less voluntary at its completion."

In the case of *Commonwealth v. Chesapeake & Ohio Ry. Co.*, 14 Ky. L. R., 602, this court said: "A verbal agreement by the holder of a legal title that another shall be interested in the title, or to buy land from a stranger for the benefit of another, without that other paying the consideration comes directly within the statute of frauds, and creates no enforceable trust.

In *Perry on Trusts*, vol. 1, sec. 134, the author says: "A mere parol declaration by one that he is buying land for another is not sufficient to create a trust."

But it is argued by counsel for appellants that only the

4th section of the English Statute of Frauds, prohibiting any action to enforce any contract for sale of lands, or any interest in same, unless in writing, has been adopted in Kentucky; and that our statute omits the 7th sec. of said act, which declared "that all declarations or creations of trust or confidences in any lands, tenements or hereditaments shall be manifested and proved by some writing signed by the party who is by law to declare such trust, or by his last will in writing, or else they shall be entirely void, and of non-effect."

It may be noted that our statute being the fourth section is supplemented by another statutory provision, providing "that no estate of inheritance, or freehold, or for a lease of more than one year, in lands, shall be conveyed, unless by deed or will." (Ky. Stats., sec. 490.)

So that, whether our legislature in adopting the fourth section thought it all sufficient, where supplemented by this other section of our statute quoted, to prohibit every species and character of trust, not only of parol contract for the sale of lands, but all voluntary parol declarations of trusts in lands, certain it is, that under these statutes the courts in this State have never sanctioned or enforced these voluntary parol declaration of trusts made by the owner of the legal title to any one, whether a child or a stranger.

We conclude that appellants can not recover on this claim in their petition, however meritorious it may be. The testator, Z. M. Sherley, having by his last will and testament devised this land to others, it is not for the court to question his right so to do, however unnatural his conduct may appear in omitting his grandchildren from an equal participation in his large estate.

To hold that this trust might be enforced on the facts of this case would be a radical departure from the uniform

course of decisions in this State to this time, and would, we think, establish a most dangerous precedent.

The chancellor below was quite correct in disallowing this claim.

The other matters of importance complained of by appellants refer chiefly to the settlements made by Z. M. Sherley as administrator of his son, Louis A. Sherley, and as guardian of his grandchildren.

And of these items the first to be noticed is as to the extent and value of the interest of Louis A. Sherley in the firm of Sherley, Woolfolk & Co. of which he was a member at the time of his death. This interest was roughly estimated by Edwin H. Bowen (who was himself interested in this firm) at fourteen thousand dollars. This estimate, however, was clearly intended to include one-half interest in the total stock of merchandise and all other assets of this firm, consisting largely of outstanding debts due the firm, accumulated and left over, as the result of a large business continued for a number of years—a business wherein it appears that by the usual course of trade extensive credits had been given—and was based, as Bowen and others clearly show, without making any deduction for bad debts. No examination or inquiry being then made into the solvency of the persons owing large amounts on the books of the firm.

As a matter of fact, when an invoice of the goods and merchandise was soon after taken, it amounted to a little less than eighteen thousand dollars, but in the sale and transfer of the interest of Louis A. Sherley, was estimated at that sum.

And it further developed that, though these outstanding assets were estimated by Bowen at ten thousand dollars, over and above the liabilities of the firm, thus making twenty-eight thousand dollars, so that the estimate of the

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one-half was fourteen thousand dollars, yet it appears clearly that the outstanding assets due the firm were insufficient in fact to pay the debts of the firm, and that Z. M. Sherley, as administrator of his son, Louis, and R. H. Woolfolk, who owned the other half interest in this firm, had to, and did, each pay into the firm the sum of one thousand seven hundred and sixty dollars and fifty cents to pay off the outstanding indebtedness of this firm of Sherley, Woolfolk & Co. And thus all the testimony shows this estimate of fourteen thousand dollars made by Bowen, as to the value of one-half the total assets of this firm, was but a wild conjecture.

The settlements made by Z. M. Sherley, as administrator of his son, were based on the actual value of this business, as clearly developed in the settlement of same. And assuming that Edwin H. Bowen, at the time of the death of Louis A. Sherley, owned one-fourth of his half interest in this firm (which was conceded by the administrator and the guardian, and which is clearly and abundantly established by the evidence), then the settlement as made by the administrator of his accounts with said estate, embracing a settlement and report of the net amount received by him from this firm, as and for the interest of Louis A. Sherley, was correct, and same is easily understood.

The net amount for which the administrator accounted as an asset received by him from this source was four thousand nine hundred and eighty-nine dollars and fifty cents, and was obtained in this way:

Stock of goods and merchandise on hand,	
valued and sold to the new firm at	\$18,000 00
One-half of this	9,000 00
Of this half Edwin H. Bowen was entitled to and	
did receive one-fourth	2,250 00
Balance to the credit of Louis A. Sherley ..	<u>\$6,750 00</u>

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But from this amount must be deducted the sum of one thousand seven hundred and sixty dollars and fifty cents, returned by the administrator of Louis A. Sherley to pay his proportion of the unpaid indebtedness of the firm of Sherley, Woolfolk & Co., thus leaving the net amount received by the administrator as the interest of Louis A. Sherley in this firm, the sum of four thousand nine hundred and eighty-nine dollars and fifty cents, and for which he accounted.

The only error apparent in the settlement is that Edwin H. Bowen, as the owner of one-fourth of the one-half interest of Louis A. Sherley in this firm, should have been required to contribute one-fourth of this one thousand seven hundred and sixty dollars and fifty cents to finish paying the debts of the firm, being four hundred and forty dollars and twelve cents.

It is not shown that there was any want of diligence on the part of R. H. Woolfolk in the settlement of the outstanding business of the firm, of which he was the surviving member. It was his duty to settle up this business, and this evidence shows he did it in good faith, honestly accounting for everything collected by him belonging to this firm. Being interested himself to the extent of one-half, he had every incentive to diligence, and we think he exercised it, and that the estate of Louis A. Sherley suffered no loss on this account.

As to the interest of Edwin H. Bowen in this firm to the extent of one-fourth of the one-half interest of Louis A. Sherley, it comes from so many sources, and is so clearly established by the evidence, that the administrator, though the father of Louis A. Sherley, and the grandfather and guardian of his children, the appellants in this case, and thus deeply interested by every consideration of blood to guard carefully their interest, yet was compelled to, and did,

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recognize this right of Edwin H. Bowen's interest in this firm to that extent. Under the evidence he was authorized so to do.

While it is true that the name of Edwin H. Bowen did not appear as a member of the firm, and while there was no written declaration of a gift, or written evidence of any agreement between Louis A. Sherley and Edwin H. Bowen to this effect, yet an interest in personalty may be given by parol, and one may undertake to stand seized to the use and benefit of another, as to personal estate by parol. Neither is the rule that actual possession must accompany the gift of universal application.

We think this case may be fairly laid within the principles of the case of *Williamson v. Yager*, 91 Ky., 284, and the cases cited in that opinion.

Another claim of appellants is as to two dividends said to have been received by the administrator of Louis Sherley of the Louisville and Evansville Mail Line Co. of two thousand seven hundred and fifty-six dollars each. This matter is satisfactorily explained by the evidence, it being clearly shown that the administrator did not in fact receive a dollar in money from this source, but that these dividends were only applied in the cancellation of the notes of Louis A. Sherley previously given this company for amounts corresponding with these dividends, and that no money was passed or paid to the administrator.

As to two of the three dividends received by Z. M. Sherley in the life time of his son, Louis A. Sherley, from the Louisville and Jeffersonville Ferry Company of four hundred and fifteen dollars each, they are shown to have been paid into the firm of Sherley, Woolfolk & Co., and that they were duly entered to the credit of Louis A. Sherley.

As to the other dividend of four hundred and fifteen dol-

lars, this item was charged by the court below in its judgment, as also the following additional items were charged to the administrator by the court, viz.: The horse and buggy owned by Louis A. Sherley at his death, and previously unaccounted for, four hundred and fifty dollars; also one-half of the debt owing (as appears on the partnership books) by Edwin H. Bowen, to the firm of Sherley, Woolfolk & Co.—debt, one thousand and thirteen dollars and twenty-five cents; one-half, five hundred and six dollars and sixty cents.

And to these items of indebtedness on the part of the administrator as found by the amount below may be added this four hundred and forty dollars and twelve cents that Edwin H. Bowen should have contributed to the payment of the debt of the firm of Sherley, Woolfolk & Co. And as to all these items it may be said, as was said by the court below, that the claim and demand by the estate of Z. M. Sherley for commissions in the settlement of the estate of his son, Louis A. Sherley, and as guardian of his two grandchildren, may be set off. No commissions had ever been allowed; they had not been waived, but, on the contrary, in the last two settlements as guardian had been expressly reserved.

And, now, when at this great length of time appellants come and seek to surcharge the settlements of the administrator and guardian, we think these commissions allowed and payable by law may be relied upon, in so far as they are reasonable and just, as a set-off to any items established against the administrator or the guardian. And it appears they are quite sufficient to pay off and discharge all additional items of debit established in this case.

Wherefore the judgment is affirmed.

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CASE 79—PETITION ORDINARY—MAY 17.

Tevis v. Rice.

APPEAL FROM MADISON CIRCUIT COURT.

TERMS OF POLICE JUDGES.—Under sec. 167 of the new Constitution the terms of police judges elected in November, 1893, did not begin until September 1, 1894, and the General Assembly had no power to provide otherwise as to police judges of cities of the fourth class.

J. A. SULLIVAN FOR APPELLANT.

1. Under sec. 167 of the Constitution, which provides for the election of all city and town officers, and which contains the proviso "that the terms of office of police judges who were elected for four years at the August election, 1890, shall expire August 31, 1894, and the terms of police judges elected in November, 1893, shall begin September 1, 1894, and continue until the November election, 1897, and until their successors are elected and qualified," the term of office of the appellee who was elected police judge of a city of the fourth class at the November election, 1893, did not begin until September, 1, 1894, and appellant who had been elected in 1892 to hold the office of police judge of that city for two years from June, 1892, was entitled to hold office until September 1, 1894. (*Boyd v. Land*, 17 Ky. Law Reporter, 273.)
2. This construction should be given because no other construction would comply with the well-settled rule that all parts of a statute should be construed together and effect given to the whole, if possible. (*Sneed*, 258; 1 *Duvall*, 407; 23 *Amer & Eng. Enc. of Law*, 309, 439, 443 and cases cited; *Kentucky Statutes*, 460.)
3. The appellant having been elected police judge for the term of two years from June, 1892, the construction of the court that he should vacate the office for appellee before the expiration of that term is retrospective and in violation of the fundamental principle that statutes are to be given a prospective operation only, unless a legislative intent to the contrary is clearly expressed or necessarily implied. (6 *Page*, N. Y., 623; 50 *Mo.*, 525; *O'Donahue v. Akin*, 2 *Duvall*, 480; *Cumberland & C. R. Co. v. Washington County Court*, 10 *Bush*, 564.)
4. The election of appellee in November, 1893, being under the ordinances of the city passed pursuant to sec. 167 of the Constitution,

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and providing that his term of office should begin September 1, 1894, the appellant is entitled to hold until that time.

A. R. BURNAM FOR APPELLEE.

Brief not in record.

JUDGE PAYNTER DELIVERED THE OPINION OF THE COURT.

The question involved in this case is as to whether Tevis or Rice is entitled to hold the office of judge of the police court of Richmond, Ky.

By the charter of Richmond it was provided that a police judge should be elected on the first Saturday in June, 1884, and every two years thereafter, and continue in office until his successor should be elected and qualified. At the June election in 1892, James Tevis was elected police judge. At the November election, 1893, H. G. Rice was elected judge of the police court. Richmond is a city of the fourth class, under the classification made by the General Assembly, pursuant to the provisions of the constitution.

It is contended by counsel for appellant, Tevis, that the term of office to which appellee, Rice, was elected did not begin until September 1, 1894, and that of Tevis did not expire until that time. Counsel for appellee insists that Rice's term began January 1, 1894.

Sec. 167 of the constitution reads as follows: "All city and town officers in this State shall be elected or appointed as provided in the charter of each respective town or city, until the general election in November, 1893, and until their successors shall be elected and qualified, at which time the terms of all such officers shall expire. . . . *Provided, That the terms of office of police judges who were elected for four years at the August election, 1890, shall expire August 31, 1894, and the terms of police judges, elected in November, 1893, shall begin September 1, 1894, and continue until the*

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November election, 1897, and until their successors are elected and qualified."

By sec. 166 of the constitution it was made the duty of the General Assembly to "provide by general laws for the government of towns and cities, and the officers and courts thereof, as provided by this constitution."

Sec. 3510, Kentucky Statutes, is part of the act passed by the General Assembly and which became a law June 28, 1893, for the government of cities of the fourth class. This section relates to the police courts of the cities of the fourth class, the judges thereof, and provides for their election (or appointment as the board of council may determine) at the general election in November, 1893.

The proviso of sec. 3510, Kentucky Statutes, is in the exact language of the proviso in sec. 167 of the constitution.

In pursuance of the foregoing provision of the constitution and laws the appellee, Rice, was elected judge of the police court. By the express terms of the constitution and the act of the General Assembly relating thereto, the slightest doubt should not be entertained that the term of office to which Rice was elected in November, 1893, did not begin until September 1, 1894.

It seems to us that there could be no words employed which would more clearly and fully express a purpose that the terms of police judges, elected in November, 1893, should not begin until September 1, 1894. It seems to us there can be no doubt as to the meaning of any word or phrase as used in the proviso, nor, taken as a whole, does it suggest any doubt as to its meaning.

Being so free from doubt as to its meaning it is unnecessary to invoke the aid of any rules for the interpretation of constitutional provisions and statutes.

There are two classes of police judges to which the pro-

viso relates: One is the judges who were elected for four years, at the August election, 1890, and the other is the police judges elected at the November election, 1893. To hold both clauses relate to the same class, to-wit: those elected for four years at the August election, 1890, would be to hold that last clause of the proviso is surplusage and entirely without meaning. This would be doing violence to a plain provision of the constitution. The terms of police judges who were elected for four years in August, 1890, began upon their qualification, and their terms would not have expired until August, 1894, and these various dates being fixed by the charters of the several cities in which the judges were elected at the August election, 1890, it was intended by the constitutional proviso to give all such judges the full terms to which they had been elected, and declare that all their terms should expire on the same day, hence August 31st was fixed as the proper time.

The August election was abolished and provision was made for a November election, at which city officers should be elected. The purpose of the proviso was to make the terms of police judges uniform and to begin at the same time.

It was therefore provided that the terms of police judges elected at the November election, 1893, should begin September 1, 1894, and continue until the November election, 1897, and until their successors were elected and qualified.

The General Assembly provided for an election of police judges at the November election, 1893, in cities of the fourth class.

Sec. 3550, Kentucky Statutes, reads as follows: "The terms of office of members of the board of common council shall begin on the first Monday in December after their election. All other officers, whether elected or appointed, shall

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begin their respective terms on the first Monday in January following. . . .”

The General Assembly had the constitutional power to enact the foregoing section in so far as it related to the time when the terms of councilmen and other officers should begin, but it can not be held that it had the power to fix the time when the terms of police judges elected at the November election, 1893, should begin, because the organic law had declared when the terms should begin, and the General Assembly was without authority to provide otherwise.

In the case of *Boyd v. Land*, 97 Ky., 379, this court held that the term of a police judge, elected at the November election, 1893, did not begin until September 1, 1894. In that case the court reviewed the case of *Johnson v. Wilson*, 95 Ky., 415, and held that the principle therein determined had no application to the question involved in *Boyd v. Land*, nor does it have to the question in this case.

We conclude that Tavis' term as police judge continued until September 1, 1894, and that Rice's did not begin until that date.

Judgment reversed, with direction that appellee Rice's petition be dismissed.

CASE 80—PETITION EQUITY—MAY 17.

Loughridge v. Cawood, &c.

APPEAL FROM HARLAN CIRCUIT COURT.

CROSS PETITION.—Where land was sold under decree of court as that of a debtor, who in fact owned only an undivided three-fourths interest, the owners of the other one-fourth not being before the court, and the purchaser of one of two tracts into which the land was divided, brought his action against the owners of the one-fourth interest to quiet his title, denying that defendants had any interest, an answer filed by defendants, asserting their claim, was properly made a cross-petition against the purchasers of the other of the two tracts into which the land was divided. As the deed under which defendants claimed described the two tracts as one and was executed to them and the other owner jointly, and the purchasers of the two tracts into which the land was divided obtained the title of the other joint owner in the same way and in the same proceedings, the cause of action set out in the cross-petition affects and is affected by the original cause of action within the meaning of sub-section 3 of section 96 of the Civil Code.

BRECKINRIDGE & SHELBY FOR APPELLANTS.

1. The cause of action set out in the cross-petition neither "affects" nor is "affected by" the original cause of action within the meaning of sub-sec. 3 of sec. 96 of the Civil Code. (*Wells v. Boyd*, 1 Duvall, 366; *Crabtree v. Banks*, 1 Met., 485; *Nolle v. Thompson*, 1 Met., 121; *Newman on Pleading*, 616 and 617.)
2. Appellees should not be allowed their cross-petition on the idea that Cawood or his heirs had the right to one action against the purchasers of the two tracts for a partition of the lands, since a suit for partition does not lie even by a rightful owner against one who is in actual adverse possession. (*Freeman on Cotenancy & Partition*, secs. 439, 447, 501; *Civil Code*, sec 499; *McIntire v. McIntire*, 82 Ky., 504, 505.)
3. The action by Clay and Headley against appellees being one of equitable cognizance to remove a cloud upon their title, while the cause asserted on cross-petition was purely legal and properly only the subject matter of an action in ejectment, the cross-petition should be stricken from the record.

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THOMAS H. HINES AND DISHMAN, DISHMAN & HAYES FOR APPELLEES.

1. The cause of action stated in the cross-petition "affects" and is "affected by" the original cause of action. (Civil Code, sec. 96, sub-sec. 3; *Holly v. Hawley*, 39 Ver., 534; *Stark v. Barrett*, 15 Cal., 368; *Robnett v. Preston*, 2 Rob. Va., 278; *Mahoney v. Middleton*, 41 Cal., 41.)
2. There is no evidence to support appellants' contention that the ancestor of appellees conveyed his interest in the 8,500 acre tract of land to Turner, for whose debts the land was sold, nor to sustain their contention that there was a deed conveying said interest, which was lost, and that the record of same was destroyed.
3. The holding of Turner by his tenants was not such an adverse possession as would divest Cawood or his heirs of title, Cawood being a joint owner of the land with Turner. (Am. & Eng. Enc. of Law, vol. 1, page 232, sec. 7; Am. & Eng. Enc. of Law, vol. 1, page 233, sec. 8; *Wall v. Wayland*, 2 Metcalf, 158.)
4. If the appellees did any act during the pendency of the suit against Turner in which judgment was rendered subjecting the property to Turner's debts, the burden of showing same was on appellants, and they have failed to do so.

JUDGE HAZELRIGG DELIVERED THE OPINION OF THE COURT.

A short time prior to 1845, Hamblin and Ledford acquired title, by patent from the Commonwealth, to 6,500 acres of land, situated in Harlan county. In the year named they also acquired title, in like manner, to a tract of some 1,900 acres adjoining the first tract.

In 1852 Hamblin conveyed his undivided one-half of this land to Wm. Turner, Sr., and Moses Cawood, describing it, among other ways, as "one undivided moiety of a certain tract of land lying in the county of Harlan on Crummies Crank Creek and Jones' Creek, supposed to contain about eight thousand acres, more or less."

In 1853, Ledford, the other patentee, conveyed his undivided one-half of the entire tract of 8,400 acres to Turner, so that Turner then owned an undivided three-fourths of the

whole tract and Cawood one-fourth. The land was what is known as "wild land," was of small value, and in the actual possession of no one. Cawood's deed was of record in the proper office, but he left the county at the beginning of the late war and was shortly killed, leaving the appellees as his heirs and representatives.

In 1876 one Sewell, a creditor of Turner, brought his action seeking to subject the lands mentioned to the payment of certain debts he held on his debtor, and after some delay, obtained a judgment of sale. To this suit the heirs of Cawood were not parties. At that sale Clay and Headly bought the 1,900 acre tract and appellants the 6,500 acre tract, and obtained commissioner's deeds therefor. In 1888 Clay and Headly brought this suit setting up their title and alleging that in 1854, as they verily believed, Cawood had conveyed his one-fourth interest to Turner in and to the 1,900 acre tract, but that the deed had been lost or destroyed and that within a short time prior to the institution of their suit, appellees, the heirs of Cawood, had begun to set up claim to the land. They, therefore, asked that their title and possession be quieted.

The appellees answered denying that their ancestor had ever conveyed his interest in the land to Turner or to any one else, and alleged that they were the owners of one-fourth of the 1,900 acre tract and of the 6,500 acre tract, and that the land had been conveyed to Moses Cawood by the deed of 1852, describing the land as one tract of some 8,000 acres, and the tract claimed by the plaintiff was embraced in that deed, and that the other land, or 6,500 acre tract, was held by Loughridge and others, who were also purchasers of Turner's interest at the commissioners' sale in the Sewell suit. They made their answer a cross-petition against Loughridge and others, who are the appellants here. The

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latter appeared and demurred to the cross-petition and also moved to strike it from the files.

The demurrer was overruled as well as the motion. The appellants then filed their answer alleging, as Clay and Headly had done, that Cawood had conveyed his interest in all the land to Turner. After a protracted litigation the court sustained the claim of Cawood's heirs awarding them a one-fourth interest in the entire tract of 8,400 acres. It is reasonably clear from the proof that Cawood, the ancestor of the appellees, did not convey his interest in the land to Turner or any one else, nor did the purchasers at the decretal sale, Clay and Headley, or Loughridge and others, obtain any interest in the land save that of Turner's, which was an undivided three-fourths.

The chief question made, however, by the appellants, is that the cross-petition should not have been allowed against them, because the cause of action set up therein did not affect, or was not affected by, the original cause of action set up by the plaintiffs, Clay and Headley, and this is the only question necessary to be considered on this appeal.

It has been seen that the appellants occupy precisely the same relative position with reference to the 6,500 acre tract as the plaintiffs did to the 1,900 acre tract. They were purchasers of the larger tract and the latter were purchasers of the smaller, and their deeds were for these tracts separately; nevertheless, the origin of the title of the appellees is found in the single deed of Hamblin to their ancestor conveying an undivided moiety in and to a tract of some 8,000 acres, and in this tract is embraced the 6,500 acre tract and the 1,900 acre tract. Their deed conveys, however, but a single tract, and their covenant of warranty runs with each moiety thereof; and so Turner held jointly with him his interest in the whole tract. The creditors of Turner might

properly have the court to divide the lands owned by their debtor as they saw fit, and as suited the convenience of purchasers, but this could not affect Cawood or his heirs in the assertion of their claims to each moiety of the land as a single tract. The creditors of Turner could occupy no better attitude than he did, and could occupy, in fact, no other attitude than he could have done.

If Turner had sold to different purchasers the interest he obtained from Hamblin, would that have destroyed the right of Cawood to a partition of the entire tract, and would he not have been required to make all the vendees of Turner parties to his action? It is true that "a cross-petition is not allowed to a defendant except upon a cause of action which affects or is affected by the original cause of action" (subsec. 3, sec. 96, Civil Code), but it seems to us that any claim asserted by Turner or his vendees to any portion of the land affected the relation between the parties, as to each portion held jointly by them, under the common conveyance of 1852, and especially so since the claimants, Clay and Headley, of one part of the land, and the appellants, Loughridge and others, are alleged in the cross action to have obtained their title in precisely the same way and in the same proceeding. The deed from Hamblin to Cawood and Turner was of record prior to the institution of the Sewell suit, and the purchasers of Turner's interest knew that they were buying land in each particle of which the Cawoods had an interest. They knew that the Cawoods had no other title, at least of record, than the Hamblin deed, and that by virtue of it they had an undivided one-fourth interest in the entire 8,000 acre tract which embraced the two surveys of 1,900 acres and 6,500 acres. The division of their large tract into two smaller ones was without the knowledge or consent of the Cawoods and can not affect their rights. In as-

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serting claim to any part of the land they necessarily must set up their title to all of it, as that title is derived from the same source. As the 1,900 acres claimed by the plaintiffs, Clay and Headley, were a part and parcel of the 8,000 acre tract conveyed to Cawood and Turner, as an entirety, we think the cause of action set out in the cross-petition affects and is affected by the original cause of action within the meaning of the Code, and that it was properly so held by the lower court.

Judgment affirmed.

CASE 81—INDICTMENT—MAY 18.

Kidwell v. Commonwealth.

APPEAL FROM ESTILL CIRCUIT COURT.

TWO OR MORE PERSONS JOINTLY INDICTED MAY TESTIFY FOR EACH OTHER, although a conspiracy is charged in the indictment and proved, the provisions of the Criminal Code and amendments thereto, disqualifying co-conspirators jointly indicted from testifying for each other, having been repealed.

WHITE & SMITH AND RIDDELL & RIDDELL FOR APPELLANT.

1. The court erred to the prejudice of the appellant in refusing to admit the testimony of Jesse Lunsford and Earl Kidwell who were jointly indicted with appellant and charged with conspiring together for the purpose of detaining and having carnal knowledge of one Pattie Tuggle. (Act of General Assembly approved March 23, 1894, repealing sec. 234 and sub-secs. 3 and 4 of sec. 223, Criminal Code; Thompson v. Commonwealth, 16 Ky. Law Rep., 168.)
2. The continuance asked for by defendant on the ground that he had no opportunity to consult his attorneys or to procure witnesses, the indictment having been returned only fifteen minutes before his case was called, was improperly refused by the court.
3. The finding of the jury was not sustained by the evidence in the case.

WM. J. HENDRICK, ATTORNEY GENERAL, FOR APPELLEE.

1. The circuit judge having the best opportunity to judge of all the facts and circumstances presented in regard to granting appellant a continuance, it must be conceded, under the ruling of this court that the circuit courts should be allowed a wide discretion on all such questions, that the court below acted wisely and within the law.
2. If the case of Thompson v. Commonwealth, 16 Ky. Law Rep., 168, establishes the law as to the admission of testimony of confederates and co-conspirators, the exclusion of the testimony of those indicted jointly with defendant and charged with conspiracy was error in the court and the judgment in the case should be reversed.

JUDGE EASTIN DELIVERED THE OPINION OF THE COURT.

On the first day of April, 1893, the grand jury of Estill county returned an indictment against the appellant, Thomas Kidwell, Jesse Lunsford and Earl Kidwell, charging them with the crime of rape, alleged to have been committed on the person of one Pattie Tuggle.

On motion of appellant, a separate trial was awarded him, and, after a number of continuances, the case having been again called for trial at the March term, 1895, of the Estill Circuit Court, both the Commonwealth and the accused announced themselves ready for trial. The work of impaneling a jury was then begun, and after seven jurors had been selected and agreed upon, the Commonwealth's attorney made a motion to quash the indictment, and to refer the case again to the grand jury, which was then in session. To this motion appellant objected, but the court sustained the same, and the case having been re-referred to the grand jury, that body, on the same day and within an hour thereafter, returned another indictment charging these same parties with unlawfully and feloniously detaining this female against her will, and charging that the parties so ac-

cused had feloniously conspired and banded themselves together for the purpose of detaining the said Pattie Tuggle, etc.

The case being again called for trial on the same day under this new indictment, appellant asked for a continuance and filed his affidavit in support of the motion, alleging that the indictment had only been returned a few minutes before, that he had had no opportunity of consulting his attorney or of talking with his witnesses, and that he was not guilty of the charge, but the court overruled his motion for a continuance and ordered the trial to proceed, to which appellant excepted. The jury found appellant guilty and fixed his punishment at two years in the penitentiary. A motion was then made by appellant to set aside the verdict and the judgment rendered thereon, and for a new trial, but this motion was overruled by the court, and appellant then excepted and prayed this appeal.

Although appellant urges, as ground for reversal, the fact that he was forced to go to trial under this indictment on the same day on which it was returned and without any reasonable opportunity to prepare therefor, yet it is unnecessary for us to pass upon the sufficiency of this ground, as the court below has so palpably erred to his prejudice in another particular as to entitle him to the reversal which he seeks, and upon that ground alone we prefer to base our decision.

It is to be observed that not only was there a change in the second indictment, as to the character of the offense charged, but this indictment also charges a conspiracy between appellant and the other defendants to commit this offense. It is argued by counsel for appellant that the purpose of the attorney for the Commonwealth in so charging appellant and Jesse Lunsford and Earl Kidwell with having

conspired and confederated together for the commission of this crime, was to disqualify and render incompetent these alleged co-conspirators, as witnesses in behalf of appellant.

However this may be, the court below did refuse to allow either of these alleged accomplices, Lunsford and Earl Kidwell, to testify when offered by appellant as witnesses, and, as it appears from the avowals of his counsel as to what could be proved by them, that their testimony would have been material to him in his defense, we think the court thereby committed an error to the prejudice of his substantial rights.

It is true that as the law formerly existed in this State, where two or more persons were jointly indicted for the same offense, they could not testify for each other if the indictment charged a conspiracy between them. This is expressly provided in sec. 234 of the Criminal Code (Carroll's edition), which corresponded with sec. 232 of the code that went into effect January 1, 1877. And by sec. 3 of the act of May 1, 1886, it was provided as follows, to-wit: "If two or more persons are jointly indicted, they may testify for each other, unless a conspiracy is charged in the indictment and proven to the satisfaction of the court." (See sec. 223 Criminal Code, Carroll's edition, 1888, and amendments thereto.)

But, by an act of the General Assembly of this State, approved March 23, 1894, both sec. 234 of the code, and sec. 3 of the act of May 1, 1886, above referred to, are expressly repealed. (See Session Acts, 1894, p. 372.)

It therefore follows that the exception based upon the fact that the indictment contains a charge of conspiracy no longer has any application and no longer disqualifies the party jointly charged from testifying for his co-conspirator.

This principle was recognized by this court in the case of

Thompson v. Commonwealth, 16 Ky. L. R., 168, and, while the question was not necessarily involved in that case, for the reason that it arose before the passage of the repealing statute above referred to, yet, as therein stated, the disqualification placed upon a witness by reason of his being charged as a co-conspirator has been removed, and the existence of this fact no longer renders him incompetent to testify.

Especially does there seem to be no good reason now for excluding the testimony of the alleged accomplice, since the accused is allowed by the statute to testify in his own behalf. The policy of the law seems to be to extend rather than to restrict the scope of admissible testimony, and the relaxation of the rigid rules of evidence, disqualifying witnesses because of interest or because of being parties to the record, evinces a purpose to arrive at the truth of the case by allowing all the facts to go to the jury where they may be given the weight to which they are entitled.

The court, therefore, erred in excluding the testimony of Jesse Lunsford and Earl Kidwell in this case, and for this reason the judgment is reversed and the action remanded, with instructions to the circuit court to set aside the verdict and judgment and award appellant a new trial.

CASE 82—APPEAL TO CIRCUIT COURT—MAY 18.

Mocquot v. Meadows.

APPEAL FROM FULTON CIRCUIT COURT.

1. **PARTNERSHIP—EVIDENCE.**—In this action for the settlement of a partnership between plaintiff and defendant in the buying and shipping of cotton the court should have permitted defendant to prove by plaintiff, that he, plaintiff, was the owner of a store and paid for much of the cotton in goods out of his store, realizing a large profit thereon.
2. **DOCKETING OF APPEALS TO CIRCUIT COURT—TRANSFER TO EQUITY.**—The provision of sec. 726 of the Civil Code that "appeals shall be docketed and stand for trial as ordinary actions," was intended to provide a rule to govern the clerk in docketing appeals to the circuit court, and not to change the law as to the trial. Therefore, an appeal to the circuit court from a city court in an equity action having been placed upon the ordinary docket in the circuit court, should, upon motion by defendant, have been transferred to equity.
3. **EQUITABLE ACTIONS.**—This being an action for the settlement of a partnership, be it a general or special one, it is of exclusively equitable cognizance.
4. **DEPOSITIONS.**—The action being an equitable one, the court erred in rejecting defendant's deposition, previously taken.

J. C. FLOURNOY FOR APPELLANT.

1. The circuit court erred in refusing to transfer to equity this case, which was an appeal from the judgment of the city court of Fulton in an equitable action to settle the partnership between appellant and appellee. It also erred in allowing oral proof instead of written as provided in section 552 of the Civil Code. (Civil Code, sec. 708.)

The provisions of section 726 of the Civil Code that "appeals shall be docketed and stand for trial as ordinary actions, and shall be tried anew, as if no judgment had been rendered," were not meant to change the method of trial in the admission of evidence and application of principles in equitable actions.

2. It being in evidence that the money by which the cotton was purchased was paid out by the appellee at his store, and that none of same was advanced to appellant as part of his capital in the partnership, and further that the proceeds of cotton sales were placed in bank to the private account of the appellee and he used

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same as his private money, appellant's contention that there was no agreement to share losses is corroborated, and it is conclusively demonstrated that appellee advanced money for himself alone as against appellant's labor and that the latter was not considered by the appellee as a joint owner of the goods. Hence this case comes within the rule of *Heran v. Hall*, 1 B. M., 159, that where one partner's capital is money and the other's labor, he whose capital is labor is not liable for contribution for any loss of capital in the venture. (*Schull v. Brooks*, 13 Ky. Law Rep., 335.)

3. Though the appellant and appellee are balanced against each other as to the question of sharing losses, the burden is on the appellee, and the fact that appellant was not to share either in the capital or its control, or share in the proceeds except in such profits as it might gain, is convincing proof that he was not to share in the losses.
4. It was error in the court to refuse to allow appellant to show appellee's interest in the cotton gin and to refuse to permit appellant to show how much cotton appellee paid for in goods out of his store.

ROBBINS & THOMAS FOR APPELLEE.

1. This action brought by appellee in equity to recover of appellant \$446.01 alleged to be one-half the losses sustained by appellant and appellee while engaged in a partnership enterprise of buying cotton, being one to recover an amount fixed and certain, is really one in ordinary, and the ruling of the circuit court upon appeal in refusing to transfer it to equity should be sustained for that reason; and also because that ruling is sustained by sec. 726 of the Civil Code which provides that appeals in inferior courts "shall be docketed and tried as ordinary actions, &c." (Civil Code, secs. 726, 708.)
2. There being nothing in the record to show that any of the reasons mentioned in sec. 554 of the Civil Code existed, and the appellant being present in court at the trial, the ruling of the court in refusing to allow the appellant's deposition read was proper.
3. The figures shown in the record ascertaining one-half the loss sustained in the partnership, being in the handwriting of appellant, speak loudly in favor of the appellee's contention that appellant was, under the terms of the partnership, to share the losses, for if he was not to share them why should he ascertain what the one-half amounted to?
4. The letters of appellant filed with the deposition of the witness Tucker show that he was managing the cotton as a part owner of same and that it was billed in the names of both appellant and appellee.

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5. This case comes within the rule laid down in *Heran v. Hall*, 1 B. M., 159, and also in the case of *Curd, &c. v. Ridgeway*, 9 Ky. Law Rep., 237, that, where the partnership extends to an equal proprietary interest in the corpus of the partnership property, which is the capital, the losses should be shared.
6. The judgment of the lower court should be affirmed unless the finding of facts is flagrantly against the weight of evidence. (*Thompson v. Thompson*, 14 Ky. Law Rep., 514; *Deatley's admr. v. Power*, 13 Ky. Law Rep., 139; *L. & N. R. Co. v. Gorman*, 13 Ky. Law Rep., 494.)
7. Appellee having alleged a partnership and appellant not denying same, the presumption is that a partnership did exist and that both profits and losses were to be equally shared, and the burden is on the appellant to show that he was not to bear any of the losses. (Amer. & Eng. Enc. of Law, vol. 17, page 841, sub-sec. B and notes; same, vol. 17, page 964, sub-sec. 1 and note 4; *Lee v. Lashbrooke*, 8 Dana, 214; *Connell v. Sandige*, 5 Dana, 210; *Pirtle v. Penn*, 3 Dana, 247; *Honore v. Colmesnil*, 1, J. J. Mar., 506.)

JUDGE GUFFY DELIVERED THE OPINION OF THE COURT.

This action was instituted in the city court of Fulton by the appellee against the appellant. The petition alleged, in substance, that the parties had entered into partnership for the purpose of buying and shipping cotton, through the season of 1891, each to share alike in profits and losses, and that after the business was completed the parties made a settlement of their partnership affairs, and that it was found that the losses were \$892.02, which appellee has paid, which sum appellant agreed was the true amount of loss, and asked judgment against appellant for \$446.01.

Appellant by his answer denied that he was to share any losses, also denied the settlement, as well as his liability for any sum, and, in substance, averred that appellee was to furnish the money, and appellant to give his time and attention to the business, and receive half the profits, if any, but to bear no loss, and that he had not received anything

for his services. To this answer appellee replied traversing the material allegations thereof.

A trial resulted in a judgment in favor of appellee, from which judgment appellant appealed to the circuit court of Fulton county, and upon the calling of the cause for trial, the appellant moved to transfer the same to the equity docket, which motion was overruled by the court, and proper exceptions taken. A jury was waived, and the law and facts submitted to the court, and a separate finding as to the law and facts rendered.

The court gave judgment in favor of appellee for \$446.01. Appellant's motion for new trial having been overruled, he prosecutes this appeal.

Several grounds for new trial are relied on, some of which need not be noticed.

During the trial appellant offered to prove by appellee that he, appellee, was the owner of a large dry-goods store, and that he paid for much of the cotton at his store, realizing a large profit thereon, to which appellee objected, and the court sustained the objection; also offered to prove by appellee what amount of cotton was paid for in goods out of his store, which proof was objected to by plaintiff and objection sustained; also sought to prove that appellee owned two-thirds of the cotton gin used by them, which, in like manner, was objected to, and objection sustained.

Appellant also insists that the court erred in not allowing his deposition to be read as evidence. It seems to us that the evidence offered by appellant should have been admitted, and this being an equitable action, he should have been allowed to read his deposition, which had theretofore been taken.

Appellant also insists that the court erred in overruling his motion to transfer the case to equity. This action was

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brought in equity in the city court, as the petition shows, and is manifestly an action for the settlement of a partnership, be it a general or special one, and all such actions are of exclusively equitable cognizance, unless sec. 726 of the Civil Code of Practice requires appeals in equitable actions from inferior courts to be treated, in all respects, as ordinary actions.

Appellee's contention is that such is the effect of that section. The section, *supra*, is in the following words: "Appeals shall be docketed and stand for trial as ordinary actions, and shall be tried anew, as if no judgment had been rendered."

We are not aware that this section has ever before been considered by this court.

It seems to us that the object or intention of the section was to provide a rule to govern the clerk in docketing appeals from inferior courts, and not to change the law as to the trial.

If this action had been instituted in the circuit court, and from any cause had been placed on the ordinary docket, it would, upon motion, have been transferred to the equity docket, and inasmuch as the law required this action to be tried anew, as if no judgment had been rendered, it seems to us that the motion to transfer should have been sustained.

There will have to be a new trial of this cause, hence we refrain from any discussion of the evidence or judgment rendered.

For the errors indicated, the judgment of the court below is reversed and cause remanded, with directions to set aside the judgment, award a new trial, and to sustain the motion to transfer to the equity docket, and for further proceedings consistent with this opinion.

CASE 83—PETITION ORDINARY—MAY 21.

**Kentucky Wagon Manufacturing Company
v. City of Louisville.****APPEAL FROM JEFFERSON CIRCUIT COURT, LAW AND EQUITY DIVISION.**

1. **THE BURDEN OF PROOF** is on the party who would be defeated if no evidence were offered on either side; and is fixed at the beginning of the trial by the nature of the allegations in the pleadings, and does not change during the course of the trial.

Where a city ordinance was passed providing for the annexation to the city of an adjoining town, and certain residents of the town filed a petition in the circuit court protesting against the annexation, the burden of proof was upon the petitioners, and they were entitled to the concluding argument to the jury. The fact that the court found at the conclusion of the testimony that the required per cent. of the resident free-holders of the territory proposed to be annexed had remonstrated did not change the burden of proof.

2. **QUALIFICATIONS OF JURORS.**—Tax-payers and residents of the city were not disqualified, by reason of their interest, to act as jurors, their interest being necessarily remote, uncertain and insignificant.

WALTER EVANS FOR APPELLANTS .

1. The burden of proof was upon the plaintiffs, and it was error to deny to them the right to conclude the argument to the jury. (Ky. Statutes, secs. 2760, 2761, 2762, 2763, 2764; O'Connor & McCulloch v. Henderson Bridge Co., 27 S. W. Rep., 251; 1 Greenleaf on Evidence, note 1 to sec. 74.)
2. The jury should have been impaneled from the territory beyond the limits of either Louisville or South Louisville. *Kemper v. City of Louisville*, 14 Bush, 87, distinguished.
3. The verdict is flagrantly against the evidence.
4. The court erred in admitting incompetent evidence.

H. S. BARKER FOR APPELLEE.

1. While the burden of proof, as the issues were made up, was originally upon appellants, yet during the trial a state of facts arose which shifted the burden upon the appellee. (Ky. Statutes, sec. 2762.)

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2. The interest of the citizens and tax-payers of the city was too remote to disqualify them as jurors. (*Kemper and wife v. City of Louisville*, 14 Bush, 87)
3. The verdict is supported by the evidence.

JUDGE HAZELRIGG DELIVERED THE OPINION OF THE COURT.

Within thirty days after the passage of an ordinance by the appellee, providing for the annexation of the town of South Louisville to the City of Louisville, the appellants, residents and free holders of the town, filed their petition in the Jefferson Circuit Court, "setting forth the reasons why such territory, or any part thereof, should not be annexed." The city answered denying the allegations of the petition, and seeking to avoid the force of the reasons urged against the annexation, and set up reasons why the ordinance should be approved.

By consent, the affirmative allegations of the answer were controverted of record, and upon trial before a jury, a finding resulted to the effect that a failure to annex the town to the city would materially retard the prosperity of the city and of the owners and inhabitants of the territory or town sought to be annexed. And from the judgment dismissing the petition and annexing the town to the appellee, this appeal is prosecuted. Beside the complaint that the verdict is flagrantly against the evidence, and which we need not notice, the appellants urge two grounds for reversal of the judgment:

1. That the court erred in giving to the appellee the conclusion of the argument.

2. That the jury should have been impaneled from the territory beyond the limits of either Louisville or South Louisville.

The record discloses that upon the commencement of the trial, the appellant first called and introduced its wit-

nesses. No question was raised of the propriety of this course and it was entirely proper. The appellants had set forth certain facts in their petition without proof of which, upon the denial of them by the appellee, their case would have failed at once. Sub-section 3 of section 317 of the Civil Code, provides that "the party on whom rests the burden of proof in the whole action, must first produce his evidence; the adverse party will then produce his evidence." But in the same section, sub-sec. 6, it is provided that "in the argument, the party having the burthen of proof shall have the conclusion and the adverse party the opening." So it would seem clear that the appellants ought to have had the conclusion of the argument. The rule is that the burden of proof is on the party who would be defeated if no evidence was offered on either side. This test is to be applied from the very nature of the case, at the outset of the trial, and the point is determinable from the pleadings alone. If A sues B on the latter's promissory note and the pleas of *non est factum* and of no consideration are interposed, the burden of proof "in the whole action" is on A, and even should B take the stand and admit the execution of the note, the burden of proof is not changed or the course of procedure affected.

The statute under which this proceeding was instituted, among other things, provides that "if the courts shall be satisfied that seventy-five per cent. or more of the resident freeholders of the territory sought to be annexed, or stricken off, have remonstrated, then such annexation or reduction shall not take place, unless the jury shall find from the evidence that a failure to annex or strike off will materially retard the prosperity of such city, and of the owners and inhabitants of the territory sought to be annexed or stricken off." Upon the conclusion of the entire testimony, the court

in the case at hand did find that over seventy-five per cent. of the resident freeholders of the territory within the boundary of South Louisville had remonstrated against the annexation; and this finding of the court from the evidence, is thought in some way to have changed the rule and given the conclusion of the argument to the appellee. We do not think so.

In cases cited with approval by Mr. Greenleaf, the rule is thus stated: "The burden of proof is, therefore, fixed at the beginning of the trial by the nature of the allegations in the pleadings, and it is settled as a question of law, and does not change during the course of the trial." (Greenleaf on Evidence, sec. 74, note (a.) In the pleadings of this case there were no averments as to this per centum of protestants; it was wholly a matter of proof during the course of the trial, and did not and could not affect the legal question presented at its threshold.

It is urged in the second place that the members of the jury, who were all tax-payers and residents of the city of Louisville, were disqualified, by reason of their interest, to act in the capacity of impartial triers.

We are constrained to think that learned counsel have magnified the seriousness of this feature of the case. It may be true, indeed it would seem to be indisputable, that the members of the jury were, in a slight measure at least, interested in the result, but when we consider the population and wealth of the two territories we must admit the infinitesimal pecuniary effect the addition of the smaller town must have on the larger city. The interest of the juror is necessarily remote, uncertain and insignificant.

In *Kemper and wife v. City of Louisville*, 14 Bush, 87, where the plaintiffs were seeking damages of the city and objected to the trial of their case by jurors who were residents

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and tax-payers of the defendant, the objection was held not to be well taken after a careful review of the authorities. There is some suggestion of incompetent testimony having been allowed to go to the jury, but necessarily great latitude must be permitted to both sides in investigations of this character, and we perceive no error in this respect.

For the reason indicated, however, the judgment must be *reversed* for proceedings consistent with this opinion.

 CASE 84—PETITION ORDINARY—MAY 22.

 Merchants' National Bank v. Robinson
& Co.

APPEAL FROM JEFFERSON CIRCUIT COURT, COMMON PLEAS DIVISION.

A BANK HAS NO RIGHT TO SET OFF AGAINST A DEPOSITOR'S CHECK the amount of an unmatured note which it holds against the depositor, although the depositor is insolvent and the bank will otherwise lose its debt.

HUMPHREY & DAVIE FOR APPELLANT.

1. A bank whose depositor and debtor has made a "general assignment in insolvency, has the right to set off against the deposit any debts the insolvent depositor may owe the bank;" although such debts may not have fallen due at the date of the depositor's assignment in insolvency. (Ky. Flour Co. v. Merchants' National Bank, 90 Ky., 222; German Ins. Bank v. Jackson, 10 Ky. Law Reporter, 1061; Morse on Banking, 2 Ed., 337; 3 Leigh (Va.), 697; Forbes & Bro. v. Cooper, 88 Ky., 285.)
2. As the depositor can not defeat the bank's right of set off by a general deed of assignment of "all" his property, including his deposit, for the benefit of "all" his creditors; so, on the same principle, he can not defeat it, when insolvent, by assigning by deed or check the deposit for the benefit of one particular creditor. Therefore, even if a check be treated as an "assignment" of the deposit, it will be held, like a general deed of assignment, to be an assignment "subject to the bank's right of

97	552
116	376
97	552
116	376
97	552
132	531

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set-off." (Bank of Maysville v. Windisch Brew. Co., 50 Ohio St., 151; Hawes v. Blackwell, 22 Am. St., Rep., 873; 107 N. C., 196; Laclede Bank v. Schuler, 120 U. S., 511.)

3. The case of Lester & Co. v. Given, Jones & Co., 8 Bush, 357, only holds that a check is an assignment of the deposit; and leaves undecided the question, here, as to whether such assignment is or is not subject to the bank's right of set-off.
4. The case of Graham v. Tilford & Barkley, 1 Met., 112, which held that there could be no set-off unless the debt had matured, is an obsolete case; it being in conflict with, and in effect silently overruled by, Chenault v. Bush, 84 Ky., 528; and in Ky. Flour Co. v. Merchants' Nat. Bank, 90 Ky., 225, where it was cited by counsel, and disregarded by the court.

STROTHER & GORDON FOR APPELLEES.

1. The giving of a check by a depositor is an absolute assignment and appropriation of so much money in the bank to the holders of the check, and upon the refusal of the bank to pay the same the check-holder can maintain an action against the bank for the amount of the check. (Smith &c. vs. Jones, 2 Bush, 106; Lester & Co. v. Given-Jones & Co., 8 Bush, 358; Weinstock v. Bellwood, 12 Bush, 140; Chambers v. Northern Bank of Ky., 5 Law Rep., 124; Deatherage v. Crumbaugh, 8 Ky. Law Rep., 594; Senton v. Continental Bank, 7 Mo. App., 332; Roberts' Ass'nee v. Corbin & Co., 26 Iowa, 315; Fogarties v. State Bank, 12 Rich., Law, 518; Union National Bank v. Oceana County Bank, 80 Ill., 212; Fonner v. Smith, 47, N. W. Rep., 632.)
2. A bank can not in cases of insolvency or under any other circumstances set off debts *not due* against the checkholders. (Chambers v. Northern Bank, 5 Ky. Law Rep., 124; Deatherage v. Crumbaugh, 8 Ky. Law Rep., 593; Am. & Eng. Ency. of Law, vol. 13, 578; Boone on Law of Banking, sec. 65; Fogarties v. State Bank, 12 Rich., Law, 518; Morse on Banking, sec. 329; Roberts v. Corbin, 26 Iowa, 315; Commercial National Bank v. Proctor, 98 Ill., 558; Merchants' National Bank v. Reitzinger, 20 Ill., App., 27; Daniel on Negotiable Instruments, p. 551; Fourth National Bank v. City National Bank, 68 Ill., 398; 11 Central Law Journal, 381.)
3. A check given by a depositor is not revoked by an assignment for the benefit of creditors and the conveyance of his assets to an assignee. (Roberts' assignee v. Corbin, &c., 26 Iowa, 315.)
4. The cases of Hawes v. Blackwell, 22 American State Rep., 873, Bank of Maysville v. Windisch-Muelheuser Brewing Co., 33 N. E. Rep., 1054, and Laclede Bank v. Schuler, 120 U. S., 511, do not sustain appellant's claim of the right of set-off.
5. The cases of Kentucky Flour Company v. Merchants' National

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Bank, 90 Ky., 225, and German Insurance Bank v. Jackson, 10 Ky. Law Rep., 1061, cited by appellants, involved the question as to rights between the bank and the assignee and have no application to the rights of a check-holder for value.

JUDGE GUFFY DELIVERED THE OPINION OF THE COURT.

On the 9th of June, 1892, J. M. Robinson & Co. instituted this action in the Jefferson Court of Common Pleas, against the Merchants National Bank of Louisville, alleging, in substance, that George W. Wicks & Co. executed and delivered to them, on the 2d day of November, 1891, their check on the defendant bank, by which they directed said defendant to pay to plaintiffs, or order, the sum of \$215.60, absolutely and without condition. That on the 3d day of November, 1891, plaintiffs duly endorsed said check and presented the same at the office of defendant, and demanded payment thereof, when defendant refused to pay same, and the same, or any part thereof, has not been paid, and said check was then duly protested for non-payment. That at the time said check was drawn and presented for payment as aforesaid, and for many months before said date, said George W. Wicks & Co. were, and had been, customers and depositors of said bank, and on said 2d of November, 1891, there was on deposit at said bank to the credit of said George W. Wicks & Co., and belonging to them, a sum largely in excess of the amount of said check, to-wit: The sum of at least \$1,800, which sum remained and was so on deposit in said bank on the 3d of November, 1891, and was so on deposit when said check was presented for payment, and that the refusal of the defendant to pay same was wrongful, and defendant thereby became, and is, indebted to plaintiff in the said sum of \$215.60, with interest from the 3d of November, 1891, for which sum plaintiffs pray judgment.

On the 19th of September, 1892, defendant filed its answer

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to said petition, containing two paragraphs. The first paragraph having been withdrawn need not be noticed. The second paragraph of the answer averred, in substance, that the said George W. Wicks & Co. were insolvent at the time of the execution of said check, and, on the said 2d of November, made and executed a general deed of assignment for the benefit of their creditors and ceased to carry on business, and have, ever since, been wholly insolvent. That the fact of said insolvency and assignment was known on the 2d of November, 1891, to the plaintiff and to the defendant. Said answer also showed an indebtedness of George W. Wicks & Co. to the defendant at the time of the execution of said check of more than \$6,000, no part of which, however, was due at the time of the presentation of said check. Defendant further alleged that on the 2d of November, before it had any notice of the existence of said check, or before same was presented, it determined to and did exercise its right to set off its indebtedness to said Wicks & Co., by reason of their deposit with it, against the said debts due from Wicks & Co. to it, and it was claiming the said right at the time of the presentation of said check to it, and has ever since claimed said right, an equitable right of set off, and unless it is allowed to exercise same, it will lose its said debt, exceeding \$6,000, and that the other parties to said indebtedness are all insolvent, and nothing can be made out of them, and prays that the cause be transferred to equity.

A demurrer was sustained to the answer, and defendant failing to plead further, judgment was rendered in favor of plaintiff for the amount claimed, and to reverse that judgment this appeal is prosecuted.

The only question involved is the right of appellant to set off the indebtedness of Wicks & Co. to it against the amount

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due from the appellant to its depositors, Wicks & Co. No other defense is sufficiently pleaded.

Counsel on each side have cited numerous authorities, and it may be true there is some conflict of authority in different States. Appellant insists that inasmuch as the drawers of the check were and still are insolvent, it had a right to exercise the right of set-off, although the debts owing to it from Wicks & Co. were not due at the time the check was given and payment demanded, and refers to the cases of *Kentucky Flour Company's Assignee v. Merchants National Bank*, 90 Ky., 225, and *German Insurance Bank v. Jackson*, 10 Ky. L. R., 1061.

An examination of these cases will show that the contest was between the assignee for the benefit of creditors of the depositor, and the bank.

An assignee for the benefit of creditors occupies no better position than his assignor, and in a contest between such assignee and a bank, it was held that the bank might set off the debt due the assignor against a depositor with an unmatured note, due it from such assignor, but a different rule prevails when the contest is between the holder of a depositor's check and the bank on which it is drawn.

In the case of *Kentucky Flour Company's Assignee v. Merchants National Bank*, 90 Ky., 227-8, relied on by appellant, the following language is used: "It is contended, however, that a bank stands in a different attitude from a mere individual, because its depositor would have the right to check out his deposits at any time prior to assignment, and the bank would have no right to refuse it upon the ground that he was owing it an unmatured debt. If this be so, and it doubtless would be in case checks were given to third parties, yet we fail to see how it can affect the question here."

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It thus clearly appears that if the contest had been between the holder of the check of the Kentucky Flour Company and the appellee, bank, the court would have adjudged in favor of the holder of the check.

The case of *Graham v. Tilford, &c.*, 1 Met., 112 (not referred to by counsel), seems to be an authority in point against appellant's contention. In the case, *supra*, it appears that *McMurtry* held an account on *Graham* and assigned the same to *Tilford, &c.*, who brought suit thereon. *Graham* answered and sought to set off the account with an unmatured note on *McMurtry*, which had been assigned to him before he had notice of the assignment by *McMurtry* to *Tilford, &c.*, of the account on him. The insolvency of *McMurtry* was admitted, but the court held that *Graham* could not set off the demand against him with the note he held on *McMurtry*, for the sole reason that at the time he had notice of the assignment by *McMurtry* of the account to *Tilford, &c.*, the note he, *Graham*, held on *McMurtry* had not matured, but that if the contest had been between *Graham* and *McMurtry*, the set-off would have been allowed.

The law of this State is that an unmatured debt can not be set off against a *bona fide* assignee for value of a demand due from the defendant to the assignor.

The judgment of the court below is therefore affirmed.

Kirkpatrick v. Brownfield.

CASE 85—ELECTION CONTEST—MAY 23.

Kirkpatrick v. Brownfield.

APPEAL FROM LARUE CIRCUIT COURT.

ELIGIBILITY TO OFFICE.—Where the constitution provides that no person shall be "eligible" to a particular "office" unless he possesses certain qualifications, it is sufficient that a person elected to the office possesses the required qualifications at the time fixed for taking the office, unless it is expressly provided that he shall possess them at the time of the election. And that this is the meaning of the expression "eligible to the office," as used in the constitution, is shown by the fact that in other parts of the constitution the expression "eligible to election" is used, it being reasonable to suppose that by the difference in expression a difference in meaning was intended. Therefore, when a person elected to the office of clerk of a court has at the time fixed for taking the office the certificate of qualification prescribed by sec. 100 of the constitution he is entitled to hold the office although he did not have the certificate at the time of the election.

HOBSON & O'MEARA FOR APPELLANT.

1. Under the provision of the constitution, sec. 100, that "no person shall be eligible to the office of clerk unless he shall have procured from a judge of the court of appeals or a judge of the circuit court a certificate that he has been examined by the clerk of his court under his supervision and that he is qualified for the office for which he is a candidate," it is not necessary that the certificate should be procured prior to the time of election, but it is sufficient and a full compliance with the constitutional requirement if the certificate is secured after the election, but before taking the office.
2. The words of the provision being that no person shall be "eligible to the office," there is no requirement that the certificate shall be had as a qualification of election, and under the rule of construction that a constitution or statute never disqualifies by implication, the construction that the procuring of a certificate was a condition precedent to election can not be supported by the language. (*Speed v. Common Council*, 98 Mich., 360; 39 Amer. State Reports, 555; *State v. Murray*, 9 Amer. Rep., 489; 28 Wis., 96; *Privitt v. Rickford*, 40 Amer. Rep., 301; 26 Kans., 52; *Demaree v. Scates*, 34 Amer. State Rep.,

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113; 50 Kans., 275; Brown v. Gobin, 112, Ind., 113; State v. Trumpf, 50 Wis., 103; Smith v. Moore, 90 Ind., 294.)

3. In view of the fact that the other provisions of the constitution providing the qualifications of other officers expressly so provide when the qualifications relate to the time of election it can not be held that the provision of this section, which expressly says, "eligible to the office," means to impose a qualification necessary for or condition precedent to election. (Kentucky Constitution, secs. 32, 91, 92, 114, 121, 130, 165, and 237.)
4. A construction of the statute which would require a certificate to render a man eligible for election would be a deprivation of the right guaranteed to the voters by sec. 1460 of the Kentucky Statutes, which provides that a blank space shall be left on the ballot in which may be written the name of the voter's choice for the particular office, if not printed on the ballot, since no one would have a certificate save those on the ballot, and consequently they alone could be properly voted for, and thus the electors voting for any one else would be in effect disfranchised.
5. The word "candidate," in sec. 100 of the constitution, can not, as contended by appellee, be restricted in its use to mean an aspirant to an office *before* the election alone.
6. The contention of the appellee that the word "eligible" means capable of being chosen or elected," is untenable, since with that meaning the words "for election," which follow in many sections of the constitution, would be redundant and meaningless.
7. The debates of the Constitutional Convention cited by the appellee in support of his contention were made on the original draft of the section in question months before its adoption, and when it contained radically different language from that which it at present contains, and are, therefore, of no value here.

I. W. TWYMAN AND D. H. SMITH FOR APPELLEE.

1. In the provisions of sec. 100 of the constitution, that "no person shall be eligible to the office of clerk, &c.," the word "eligible," according to the ordinary acceptance of the term, which has been accepted by the best legal authorities, means "capable of being elected or chosen," as well as the capacity of holding office, and, therefore, the section referred to requiring a person to procure a certificate from a judge of the Court of Appeals or of a circuit court that he has been examined by a clerk of his court under his supervision and that he is qualified for the office before he is eligible to the office of clerk, impose that as a condition precedent to his election as well as to holding the office. (Webster's Unabridged Dictionary; Worcester's Unabridged Dic-

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- tionary; Bouvier's Law Dictionary; Abbott's Law Dictionary; Amer. & Eng. Enc. of Law; 3 Nevada, 570; 23 Nebraska, 385; 3 Minn., 240; 45 Minn., 309; 15 Cal., 119; 73 Cal., 230; 11 R. I., 638; 99 Nev., 291; 12 Ind., 569; 14 Ind., 93; 15 Ind., 327; 35 Ind., 111; 61 Ind., 392; 63 Ind., 592; 87 Ind., 520; 96 Ind., 376.)
2. The provision of sec. 100, that the certificate shall state "that he is qualified for the office for which he is a candidate," the word "candidate" can have reference only to the time before election for one can not, in a political sense, be a candidate for an office after his election to that office. Consequently the failure of appellant to procure the required certificate prior to the election renders him ineligible to election and to office.
 3. The contention of the appellant that when the qualification prescribed is not followed by the words "at the time of the election," it merely relates to holding the office can not be sustained. (Constitution, secs. 32, 45, 71, 72, 82, 92, 93, 100, 114, 120, 121, 130, 150, 165, 209, 237, 239.)
 4. The debates of the members of the constitutional convention of 1849, which adopted the section under consideration, incorporated into the present constitution as then adopted, clearly show that the intention of that body was to prescribe a qualification for election, and this intent should govern in the construction of the section. (Constitution of 1850, sec. 2, article 6; debates Con. Con., 1849, pp. 362-383.)
 5. Under the constitution of 1850, a statute was passed providing that "when a person returned is found not to have been legally qualified to receive the office at the time of his election, a new election shall be ordered," and this statute has been re-adopted by the General Assembly under the new constitution, and the courts having approved this statute, the conclusion that the qualification had reference to the election is irresistible. (Kentucky Revised Statutes, sec. 8, art. 7, ch. 32; General Statutes, sec. 8, art. 7, ch. 33; Kentucky Statutes, sec. 1531, sub-sec. 8; 16 B. M., 542; 10 Bush, 743; 18 B. M., 725; 11 Bush, 86; Lawson's Rights, Remedies and Practices, sec. 3742.)

JUDGE HAZELRIGG DELIVERED THE OPINION OF THE COURT.

The appellant and appellee were rival candidates for the office of county court clerk, of Larue county, at the November election, 1894. Appellant received a majority of the votes cast, and was awarded a certificate of election by the canvassing board. Appellee contested his election upon

the ground that he had not, *at the time of his election*, procured from the proper officer a certificate of his qualification as required by law.

It was agreed that the appellant, on the 8th day of September, 1894, had obtained from the clerk of the Larue Circuit Court, a certificate showing his qualification, and that on the 10th day of November, 1894, he had procured from his circuit judge, a certificate stating that he had been examined by the clerk of the Metcalfe Circuit Court, under the supervision of the judge, and that the applicant was qualified for the office of county court clerk; the first certificate being issued before and the second after the election. The contesting board held the appellant to have been ineligible at the time of his election and hence not qualified to hold the office, which was, therefore, declared vacant. On appeal to the circuit court that finding was approved, and from that judgment Kirkpatrick prosecutes this appeal.

It is not contended that the certificate of September, 1894, has any efficacy, but it is insisted by the appellant that the requirements of the constitution were met upon the procurement of the certificate of the circuit judge after the election, and before the term began for which he was elected. The controlling provision of the Constitution reads as follows: "No person shall be eligible to the offices mentioned in sections ninety-seven and ninety-nine, who is not, at the time of his election, twenty-four years of age (except clerks of county and circuit courts, who shall be twenty-one years of age), a citizen of Kentucky and who has not resided in the State two years, and one year next preceding his election in the county and district in which he is a candidate. No person shall be eligible to the office of Commonwealth's attorney unless he shall have been a licensed practicing lawyer four years. No person shall be eligible to the office

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of clerk unless he shall have procured from a judge of the court of appeals or a judge of a circuit court, a certificate that he has been examined by the clerk of his court under his supervision, and that he is qualified for the office for which he is a candidate." (Section 100.)

For the appellant it is said that so much of this section as refers to the age and residence of the candidate, relates to the time of the election, because it is so expressed; but that the rest of the section relates, not to the time of election, but to the time of holding the office. That the words, "eligible for the office," and "eligible to election," or "eligible when elected," are purposely used to convey different meanings. On the other hand, the appellee contends that the word "eligible" has a well-defined, legal signification, and the expression "eligible to the office," is but a brief and concise form of stating "capable of being legally chosen or elected to the office."

Each party appeals to his favorite lexicographer to support his contention in the use of the word "eligible," and it is evident that the construction of the section can not be made to depend on the definition given by these learned compilers. The word is variously defined, as "proper to be chosen;" "legally qualified, as eligible to office," and we are thus left to ascertain in some other way the sense to be attached to the word as used in the section. Primarily, the word "eligible," from the latin, *eligere*, to elect, means capable of being elected, or if we may temporarily coin a word, eligible means "*electible*;" but the use of the word is not at all confined to this primary meaning, and if we attempt to substitute this meaning in the various sections of the Constitution where the word is used, we reach quite absurd results, whereas, if we substitute the definition "legally qualified," as insisted on by the appellant, we obtain a consistent

and natural construction of all the sections. In section 114 we read: "No person shall be *eligible to election* as judge of the court of appeals," etc. In section 130 we read: "No person shall be eligible as judge of the circuit court who is less than thirty-five years of age *when elected*," etc. Manifestly, the word does not import in these sections more than that the person shall be "legally qualified," and because that legal qualification is required to exist *at the time of the election* other words were added to so indicate the purpose in view by the framers of the constitution. By section 93 certain officers are made *ineligible to re-election*, and by section 165 a notary public and officers of the militia are declared not *ineligible* to hold or exercise any office, etc. The framers of the constitution, in these sections, used the word in the sense of legally "qualified" for office or qualified to hold office. Thus "No person shall be qualified for election as judge of the court of appeals, etc., or qualified as judge of the circuit court, who is less than thirty-five years of age *when elected*," etc. And so in numerous instances it is apparent that where eligibility is required, as of the date of the election, words are used to make the meaning indisputable. So in no less numerous instances, we find the words "eligible to the office," without additional words, relating to *the time of election*.

We think, therefore, that the words in themselves, as used in the constitution, mean "qualified for the office," not at the time of election, but at the time when the office is to be first assumed. Considering the care with which the constitution was prepared, and the scholarly distinction of many of its framers, we do not suppose that the same meaning is to be attached to the words "eligible to election" and "eligible to office," or "ineligible to re-election" or "ineligible to office."

Our conclusion, therefore, is that under the first part of the section under consideration, the words "eligible to the offices," mean "qualified for the offices," and except for the words "at the time of his election," the eligibility required of the candidate would relate to the time when he was about to hold or assume the office, and that the same words "eligible to the office," used in the latter part of the section, relate to the same time and are without words fixing the date of the eligibility at the time of the election.

This construction, it seems to us, is in accord with a general and manifest purpose on the part of the framers of the constitution. The changes of phraseology found in the various sections, was not, we think, the result of mere chance.

The words "office of clerk," mentioned in the last sentence of the section, embraced the offices of circuit and of county court clerks, and as descriptive of the particular office for which the applicant should obtain a certificate of qualification, the words, "for the office for which he is a candidate," were used. We think the words were used without an intention to indicate the time when the applicant for the office was to obtain his certificate. At best the use of this word would raise only a presumption that the certificate was to be procured before the election, and we should not allow such presumption to override what we conceive to be the general purpose in view by the use of the terms in controversy. To do so "would be to suppose," says Mr. Story, "that the framers weighed only the force of single words as philologists and critics, and not whole clauses and objects as statesmen and practical reasoners."

While the provisions of the section under consideration are a substantial re-adoption of sec. 2, art 6, of the old constitution, there seems to have been no adjudication by the court affecting the question here involved.

In *Stevens v. Wyatt*, 16 B. M., 542, relied on by the appellee, Garrett was held ineligible by the lower court, first, because he had no certificate of qualification, and, second, because he had not been a resident of Montgomery county for one year next preceding the election. And this court said: "As the facts respecting Garrett's ineligibility were agreed, no doubt is entertained of the propriety of the action of the board in refusing him a certificate of election."

There was an entire absence of any certificate obtained, either before or after the election, and manifestly, if Garrett had obtained his certificate after the election, or even before, the result would not have been different, as he was ineligible for another and conclusive reason. There was no controversy on Garrett's part, and the opinion makes no reference to the point now involved, nor was the argument of counsel so directed.

A few other cases from this court are referred to as touching the question, but throughout them all the question now in issue remained undetermined. Nor does the statute (section 1531, subsec. 8) providing for a new election in the event the person returned as elected is found not to have been legally qualified to receive the office at the time of the election, affect the question. Many of the tests of eligibility are to be applied under the various statutes as of the time of the election, and, if when the term begins, the person elected can not qualify, a vacancy necessarily occurs, which may be filled as provided by law.

The Nevada case of *State v. Clarke*, 3 Nev., 570, sustains the appellee's contention as to the meaning of the word "eligible," holding it to signify, when used in statutory and constitutional clauses, such as we are considering, one "capable of being elected or chosen," and hence, the "eligibility" must relate to the time of the election.

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To the same effect are the cases of *State v. McMillen*, 23 Neb., 385, and the Minnesota and California cases, as well as the earlier Indiana cases. But the Indiana court, in *Smith v. Moore*, 90 Ind., 294, reviewed its former decisions and adopted a different construction, saying, that "legally qualified" is the meaning that should be given to the word "eligible" as used in the section of the constitution under consideration.

To the same effect are the cases of *State, ex rel, v. Murray*, 28 Wis., 96 (s. c. 35 Am. R. 638); *Privett v. Bickford*, 26 Kan., 52 (40 Am. R., 301), and *Demaree v. Scates*, 50 Kan., 275 (1893), where the whole question is discussed and authorities reviewed.

These cases discuss largely, and in some respects the conclusion is made to depend on, the etymology of the word "eligible," and in this respect we think the contention of the appellant is supported by the better argument. But what is more important than this, we believe the framers of the constitution had in view a difference in meaning when they provided in one clause for "eligibility for office" and in another "eligibility to election."

The judgment below is reversed for proceedings consistent with this opinion.

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CASE 86—PETITION EQUITY—MAY 24.

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Company.

APPEAL FROM JEFFERSON CIRCUIT COURT, CHANCERY DIVISION.

INSURANCE—SURRENDER OF PART OF CLAIM IN IGNORANCE OF LEGAL RIGHTS.—Where the holder of an insurance policy in ignorance of his legal rights and not as a compromise of a doubtful claim has been induced by the fraudulent misrepresentations of the company's agents to accept in satisfaction of his loss under the policy a smaller amount than was due him, a court of equity will, at his instance, rescind the contract by which he surrendered a part of his claim.

SIMRALL, BODLEY & DOOLAN FOR APPELLANT.

1. The agents of appellee having, by fraudulent misrepresentations, induced the appellant to enter into a contract to accept one-half of the amount of the damage to the property and surrender the policy, the contract entered into by reason of these representations of appellee's agents should be rescinded.
2. The appellant being ignorant of his antecedent rights under his policy of insurance, and being induced to believe by misrepresentations of appellee's agent, that he was not entitled under the law to recover the full amount of the loss sustained, and that any amount that he might receive on the policy was a matter of grace on the part of appellee, equity will grant relief from the contract into which he was thus induced to enter by reason of his ignorance of the law. (Kerr on Fraud & Mistake, pp. 81, 399, 400, 403, 404; Pomeroy's Equity Jur., (last ed.), secs. 849, 850, 851, 852; Story's Equity Jur., secs. 120-126, 130, 131; Bispham's Prin. of Equity, sec. 188; Dembitz Ky. Jur.; Fitzgerald v. Peck, 4 Litt., 125; Underwood v. Brockman, 4 Dana, 309-315; Ray v. Bank of Ky., 3 B. M., 513; Gratz v. Redd, 4 B. M., 190; City of Louisville v. Zanone, 1 Met., 153; Covington v. Henning, 1 Bush, 382; McMurtry v. Ky. Cent. R. Co., 84 Ky., 465; L. & N. R. Co. v. Hopkins County, 87 Ky., 613; London & Lancashire Ins. Co. v. Oaks & Cook, 15 Ky. Law Rep., 540; Webb v. City of Alexandria, 33 Gratt., 176; Whelen's Appeal, 20 P. F. Smith, 427; Bales v. Hunt, 77 Ind., 355; Sparks v. White, 7 Humphrey, 90.)
3. Appellee being fully advised at the time the policy was issued of

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the incumbrance on the piano, it can not now be heard to complain that by reason of that incumbrance the policy was vitiated.

GIBSON, MARSHALL & LOCHRE FOR APPELLEE.

1. The policy of insurance issued to appellant, providing that if the property should be encumbered all insurance should cease unless in writing the company had consented to still continue liable upon the risk, and there being doubt as to whether or not this fact had been communicated to the company, the advice of appellee's adjuster to appellant that he accept one-half the amount of the damage to the piano was not a fraudulent misrepresentation, and the compromise contract should not be rescinded on that ground.
2. Ignorance of his rights under the law are not sufficient to set aside this voluntary written agreement of compromise entered into after deliberation and opportunity to investigate as to his rights on the part of the appellant. (Thompson v. Phoenix Insurance Co., 75 Maone, 55; Aetna Insurance Co. v. Reed, 33 Ohio State, 283; Mayhew v. Phoenix Insurance Co., 23 Mich., 105; American Insurance Co. v. Crawford, 7 Bradwell (Ill.), 29; Dunn v. Commonwealth Insurance Co., 3 Ins. L. J., 631.)
3. It appears from appellant's petition, in the absence of an allegation that there was a written indorsement that there was an incumbrance on the property insured, that the claim of appellant was a doubtful one, and the compromise agreement entered into by appellant and appellee comes within the rule laid down by this court in the case of *McMurtry v. Kentucky Central R. Co.*, 84 Ky., 465 that "no recovery can be had when the parties regard the question of either law or fact as doubtful and make payment by way of compromise to avoid litigation."
4. The representation of appellee's agent that the incumbrance had vitiated the policy was not a fraudulent misstatement even if he had been mistaken in his opinion, which is by no means admitted, and, therefore, the ruling of the court in the case of the *London & Lancashire Insurance Co. v. Oakes & Cook*, 15 Ky. Law Rep., 540, is not decisive of this case. (15 Ky. Law Rep., 574; *City of Louisville v. Anderson*, 79 Ky., 339.)

JUDGE EASTIN DELIVERED THE OPINION OF THE COURT.

This equitable action was brought by appellant to rescind a contract made with appellee, by which, as alleged, he was induced to accept, in satisfaction of a loss under

a policy of insurance issued to him by appellee, an amount equal to one-half of that loss and to one-half of the amount of insurance named in the policy.

As grounds of rescission, the petition charges that appellant was ignorant of his legal rights under the policy and that, through fraud and imposition practiced upon him by appellee's agents, and by wilful misrepresentation made by them, as to his rights under the contract of insurance, he was induced to accept a part of his claim in satisfaction of the whole.

The chancellor sustained a general demurrer to the petition, and appellant declining to plead further, his petition was dismissed, from which ruling this appeal is prosecuted; so that the only question for consideration here is whether or not the facts alleged in the petition, and admitted by the demurrer, are sufficient in equity to entitle appellant to the relief sought.

The petition charges, in the fullest and strongest terms, appellant's ignorance of the rights and obligations of the parties under the policy of insurance, and full knowledge on part of appellee, both as to the rights of the parties and as to appellant's ignorance of them, as well as false and fraudulent misrepresentations made by appellee's agents for the purpose of deceiving, and which did deceive, appellant as to the validity of his claim under the policy. It charges, among other things, that appellee fully understood its liability to appellant for the full amount of his loss, that he was ignorant of the law governing his right and appellee's obligations, while appellee both knew his rights and knew that he was ignorant of them, and, with this knowledge and intending to deceive and defraud him, fraudulently represented to him that, by reason of an incumbrance on a part of the insured property, his entire claim under

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the policy was forfeited; that these false representations were made to him by appellee for the purpose of deceiving and defrauding him, and that, by these false and fraudulent representations, and through ignorance of his legal rights, he was induced to accept the sum of four hundred dollars in satisfaction of a loss of eight hundred dollars, when, except for these fraudulent representations and his ignorance, he would not have done so.

These charges being admitted, it seems to us that the case presented involves something more than an effort to obtain relief purely on the ground of a mistake of law, or mere ignorance on part of appellant as to his legal rights under the contract of insurance. It becomes, in addition to this, a case of actual fraud, where by fraudulent misrepresentations made for the purpose and with the intent to deceive, the known ignorance of one of the parties to the contract has been wilfully taken advantage of, and he has thereby been induced to surrender a valid, subsisting right without consideration. It is true that the ignorance relied upon is an ignorance of law rather than of fact, and that this is not always, or perhaps generally, and when standing alone, available as a ground of relief against an executed contract, no matter how inequitable it may be. On this point the decisions of the courts of this country, as well as the English courts, are by no means uniform, but, in our opinion, the weight of authority and the decisions of this court would now forbid that a party, who, with full knowledge of the ignorance of the other contracting party, has not only encouraged that ignorance, and made it the more dense by his own false and fraudulent misrepresentations, but has wilfully deceived and led that other into a mistaken conception of his legal rights, should shield himself behind the

general doctrine that a mere mistake of law affords no ground for relief.

This view seems to be upheld by many, if not all, of the modern text writers, who are recognized as authority on the question.

Mr. Kerr, in his well-known work, in treating this subject says: "But if it appear that the mistake was induced or encouraged by the misrepresentation of the other party to the transaction, or was perceived by him and taken advantage of, the court will be more disposed to grant relief than in cases where it does not appear that he was aware of the mistake." (Kerr on Fraud and Mistake, pp. 399, 400.)

And, in his work on Equity, Mr. Bispham lays down this doctrine, in even stronger and less uncertain terms. He says: "Where ignorance of the law exists on one side, and that ignorance is known and taken advantage of by the other party, the former will be relieved. More particularly will this be so if the mistake was encouraged or induced by misrepresentations of the other party." (Bispham's Principles of Equity, sec. 188.)

Under the admitted facts of this case and the circumstances surrounding and leading up to the mistake relied on here, it is clearly brought within the text above quoted; and many other authorities to the same effect, including reported cases in many of the States of this Union, might be cited, if it were deemed necessary.

We fully recognize the wisdom of that rule which always inclines the courts to uphold and enforce the validity of voluntary compromises and adjustments between parties of their legal differences, when fairly arrived at. Nor would any mere ignorance of or mistake in the law governing any doubtful and disputed legal proposition, on part of either of the parties to the compromise, in the absence of evidence

tending to show that he has been over-reached or unfairly dealt with, or taken advantage of, and where supported by a good consideration, be sufficient, in our judgment, to justify the rescission of a compromise settlement, deliberately made between parties, standing upon an equal footing and with full knowledge of all the facts. If every mistake of law were sufficient to warrant the interference of the courts, then no compromise of a disputed legal proposition would be final, for, in every such case, one party or the other to the controversy is mistaken as to the law of the case.

Upon the record before us, there may be some question as to how far there was a controversy between these parties over any doubtful legal question that might have been litigated in court, or exactly what was the nature and extent of the same.

It is alleged in the petition that appellee claimed that all rights of appellant under his policy of insurance were forfeited, by reason of the existence of an incumbrance upon a part of the insured property; but it is further alleged that appellee, at the time the contract of insurance was made, "had full knowledge of the same, and having such knowledge, made the contract and issued the policy aforesaid." This allegation is admitted to be true, and, in the absence of anything further in the pleading, pertaining to this point, we are unable to see in this the basis of a doubtful disputed legal proposition which might have been litigated in the courts, or to know exactly what controversy was settled by the parties.

But, waiving the question as to the nature and extent of the controversy between appellant and appellee, and reverting to the character of the compromises which the courts will uphold, we now quote from another text writer who uses this language, to-wit: "Voluntary settlements are so

avored that if a doubt or dispute exists between parties with respect to their rights, and all have the same knowledge or means of obtaining knowledge, concerning the circumstances involving these rights, and there is no fraud, misrepresentation, concealment, or other misleading incident, a compromise into which they thus voluntarily enter, must stand and be enforced, although the final issue may be different from that which was anticipated, and although the disposition made by the parties in their agreement may not be that which the court would have decreed had the controversy been brought before it for decision. Of course there must not only be no misrepresentation, imposition or concealment; there must also be a full disclosure of all material facts within the knowledge of the parties, whether demanded or not by the others." Pomeroy's Equity Jurisprudence, sec. 850.

Under the authorities quoted it is manifest that the compromise contract sought to be rescinded here is within the control of a court of equity and may be set aside.

And now, referring to the decisions of this court and to the doctrine established in this State, it seems to us still clearer that the contract complained of, and which was made under the circumstances set forth in the petition and admitted by appellee, can not be sustained.

In an exhaustive opinion in which the authorities were ably reviewed by Judge Robertson, after referring to the difficulty of determining, in every case, when a contract was, in fact, made under a mistake of law, it is said: "When it can be made *perfectly evident*, that the only consideration of a contract was a mistake as to the legal rights or obligations of the parties, and when there has been no *fair compromise of bona fide* and doubtful claims, we do not doubt that the

agreement might be avoided on the ground of a clear mistake of law, and a total want, therefore, of consideration or mutuality." Underwood v. Brockman, 4 Dana, 309.

In the case of Ray and Thornton v. Bank of Kentucky, 3 B. Mon., 510, this court referred to and approved the above case and said: "Upon the whole we would remark that, whenever, by a clear and palpable mistake of law or fact essentially bearing upon and affecting the contract, money has been paid without cause or consideration, which in law, honor or conscience was not due and payable, and which in honor or good conscience ought not to be retained, it was and ought to be recovered back."

Both of these cases are cited with approval in the case of Louisville & Nashville R. Co. v. Hopkins County, 87 Ky., 613, and the doctrine laid down therein has not been departed from by this court.

It will be seen that the question of fraud did not enter into the decision of either of those cases, but that they are almost entirely based upon the fact that there was no good consideration to uphold the contracts, that it was not a fair compromise of bona fide and doubtful claims, and that the money was not in law, honor or conscience payable, and ought not in honor or good conscience to be retained. If for these reasons a contract, made under a clear mistake of law, may be set aside, then how much stronger reason is there for annulling the contract under consideration. Not only was this contract, according to this record as it comes before us, wholly without consideration, and not only was the money surrendered by appellant on his claim, not due in law, honor or conscience, and surrendered only under a clear mistake of law, but it is further admitted by the demurrer that this contract was obtained, and that appellant was induced to surrender one-half of his claim, by the actual

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false and fraudulent misrepresentation of appellee, knowingly made for the purpose of deceiving and defrauding appellant.

We are clearly of the opinion that the chancellor erred in sustaining the demurrer to the petition, and for the reasons indicated, his judgment dismissing appellant's petition is reversed and the action is remanded, with directions to set aside that order and to overrule the demurrer and give appellee leave to file an answer.

CASE 87—PETITION ORDINARY—MAY 24.

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APPEAL FROM GREENUP CIRCUIT COURT.

1. **EXEMPTIONS—CONFLICT OF LAWS.**—Where a debtor residing in this State goes into another State for temporary purposes of business or pleasure, taking with him personal property which is exempt from execution or attachment under the laws of this State, but which is not exempt under the laws of the State into which it is taken, a creditor residing in this State has no right to follow him and subject the property, and if he does so the debtor is entitled to recover damages.
2. **SAME.**—The courts of this State have the power, and it is their duty, to enjoin citizens of the State within their jurisdiction from evading the laws of the State through the machinery of the law or courts of a foreign State.
3. **SAME.**—Exemption laws have no force beyond the territorial limits of the State enacting them, hence a citizen of one State when his property is levied on in another State can not plead with effect the exemption laws of his own State.

BENNETT & BENNETT FOR APPELLANT.

1. A creditor, who is a resident of this State, can not follow the property of his debtor, which is exempt from execution under the laws

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- of this State, into another State where it has been taken temporarily, and there subject it to the payment of his debt.
2. Where the exempt property of a resident of this State has been taken from him by such a proceeding on the part of his creditor, he is entitled to recover damages for such taking. (*Woods v. Woods*, 78 Ky., 624.)
 3. The judgment of the Ohio court ordering a sale of the property of the appellant is void for want of jurisdiction over either the person or subject-matter. (4 *Waite's Actions and Defenses*, 193, 195; 6 *Idem*, 813, 819; 1 *Idem*, 45, 48.)
 4. The appearance of the appellant in the Ohio court upon the trial of the attachment for the purpose of demanding his property from the officer and the appellee, did not give that court jurisdiction over either the person of appellant or his property.

The allegation of the appellant's petition that he appeared in the Ohio court for that purpose alone must be taken for true on demurrer. (*General Statutes*, ch. 38, pp., 571-573; *Morgan v. Ballard*, 1 *Marshall*, 558; *Bush v. Madrin*, 14 B. M., 231; *Francis v. Burnett*, 84 Ky., 32; *Paxton v. Freeman*, 6 J. J. M., 234; *Moxley v. Ragon*, 10 *Bush*, 158; *Colter v. Jones*, 7 B. M., 586; *Myers v. Forsythe*, 10 *Bush*, 394; *Mulliken v. Winter*, 2 *Duvall*, 257; *Anthony v. Wade*, 1 *Bush*, 112; *Carrington v. Herrin*, 4 *Bush*, 627; *Johnson v. Farmers' Bank of Ky.*, 4 *Bush*, 286; *Mitchell v. Mattingly*, 1 *Met.*, 240; *Pettit v. Mercer*, 8 B. M., 52; *Fullenweider v. McWilliams*, 7 *Bush*, 390; *Oldham v. Bentley*, 6 B. M., 431; *Baker v. Grundy*, 1 *Duvall*, 282; *Ellis v. Kelley*, 8 *Bush*, 631; *Baugh v. Baugh*, 4 *Bibb*, 556; *Story on Conflict of Laws*, secs. 586, 594, 597, 609.)

A. E. COLE & SONS FOR APPELLEE.

1. The appellant having appeared in the Ohio court and agreed to a continuance of the case against him, he is bound by the action of that court and can not afterwards object to the jurisdiction or complain in a Kentucky court of the action of the appellee in the Ohio court.
2. The courts of this State can not enjoin its citizens from proceeding with actions already begun in a foreign State. (*Harris v. Pulliam*, 84 Ill., 20; 25 *Amer. Reports*, 417.)
3. The petition of appellant was defective in failing to state facts from which it might be shown that his property, which was attached, was exempt under the laws of Kentucky, the mere statement that it was exempt being a conclusion only and, therefore, not sufficient. (*Woods v. Woods*, 78 Ky., 625; *Cole v. Young*, 24 *Kans.*, 435; *Byrne v. Sinnett*, 13 *Ky. Law Rep.*, 831; *Civil Code*, sec. 90.)

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JUDGE GUFFY DELIVERED THE OPINION OF THE COURT.

This action was instituted in the Greenup Circuit Court by the appellant, Linsey T. Stewart, against the appellee, Volney E. Thomson. It is alleged, in substance, in the petition and amended petition, that the appellee on January 31, 1894, brought suit on a note held by him against John Stewart and the appellant as surety in the court of Volney Row, a justice of the peace in Scioto county, in the State of Ohio, and sued out an attachment against appellant's property in said State, and caused the same to be levied upon a span of mules, harness and a two-horse wagon, the property of appellant, and exempt from execution and attachment under the laws of Kentucky. That at the time of said levy he had gone with them to Portsmouth, Ohio, temporarily, to haul a load of goods, going there in the morning intending to return in the evening. That appellee knowing all the facts aforesaid and with a fraudulent intent to cheat and defraud appellant out of his exemption under the laws of Kentucky, and with intent to subvert and annul the laws of Kentucky, procured the attachment and caused the levy to be made as aforesaid. That said mules were worth \$300. That at the time of the levy said property was claimed and held by him as exempt, under the laws of Kentucky; all of which was known to appellee, appellant being a citizen and resident within Kentucky with a family, and being his only team of work beasts, wagon and harness, exempt by the laws of Kentucky. That appellee was then, and for years before had been, a citizen and resident of the Commonwealth of Kentucky. That immediately after said levy he returned to Kentucky and sued out an injunction against appellee, enjoining him from proceeding with a sale of said property, but appellee in violation of said injunction proceeded with his action and caused the sale of said mules in

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the State of Ohio, on the 20th of February, 1894, and applied the proceeds to the payment of said debt, viz., the sum of \$212.

That appellant and appellee have been continuous residents and citizens of Greenup county, State of Kentucky, for years before the bringing of this action. That appellant has no property in Kentucky, subject to execution, and this fact induced appellee to perpetrate this fraud upon his rights. That the levy and sale was a great fraud upon his rights, by which he has been damaged in the sum of \$500.

It appears that a demurrer was sustained to the petition after which appellant filed an amended petition in which it is averred that the said suit against him in Ohio was set for the 3d of February, 1894, and that he was there on that day for the sole and only purpose to demand from the officer and the defendant the restoration of said property as being his exempt property under the laws of Kentucky, and did in the presence of appellee and said Row make such demand from the constable, Wm. H. Williams, who had possession of said property by virtue of the attachment, which demand was refused by the officer and by appellee. That he did not claim the property as exempt under the laws of Ohio, as stated in official return of the officer; that he did not put in any defense to appellee's suit in Ohio, or submit himself to its jurisdiction, and upon refusal as aforesaid to restore him his property, he returned home to Kentucky and instituted suit in this court and sued out his injunction, which injunction was instituted 6th day of February, 1894.

Copy of the proceedings of the justice's court of Ohio and of the injunction are filed with petition.

A demurrer was sustained to the amended petition and petition as amended and petition dismissed by the court.

Appellant filed grounds and moved for new trial, which

motion was overruled by the court and appellant has appealed to this court.

Appellee suggests that appellant failed to show by proper averments that the mules in controversy were by the laws of Kentucky exempt from execution, but we think the allegations are sufficient. The petition does not show that there is any other suit pending between the parties, hence the special demurrer can not be sustained, but appellee insists that the judgment of the justice of the peace, directing the sale of the property and disallowing the exemption, is conclusive of appellant's right to recover in this action.

Courts of justices of the peace are courts of limited jurisdiction, and there is nothing in this record to show that the justice's court had jurisdiction of the sum claimed and recovered. (*Wood v. Wood*, 78 Ky., 627.) But appellant does not rely upon the want of jurisdiction in the justice's court, hence we need not notice that question further.

The important question involved in this appeal is, whether or not a citizen of this State, who is an insolvent debtor, may go into another State for the purposes incident to inter-state commerce, social intercourse or special business, without subjecting his property, exempt by the laws of this State, from execution and attachment, which he happens to take with him, to the payment of debts due another citizen of this State, who may be watchful enough to follow and attach such property, and the debtor have no redress.

It seems to us that the law will not allow a creditor to so evade and annul the laws of his own State.

Exemption laws have no force beyond the territorial limits of the State enacting the same, hence a citizen of one State when his property is levied on in another State can not plead with effect the laws of his own State, because the

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general, if not universal, rule is that exemptions are allowed only to citizens of the State enacting such law, hence by the laws of Ohio the appellant could not legally claim the benefit of the law of Kentucky, or any exemption law of Ohio.

If the contention of appellee is to prevail it follows that any insolvent citizen of this State, who takes his property into another State for any purpose, or for any length of time, makes it subject to the demands of any creditor of this State, and the same may be said of any citizen of another State who might chance to come into this State with his property.

The exact question under consideration has never been passed upon by this court, so far as we are aware, but the supreme courts of some other States have considered the question. We concur in that part of the opinion of the Superior Court in *Byrne v. Sinnett*, 13 Ky. L. R., 831, which says: "The weight of authority is that an injunction will lie by a citizen to restrain another citizen from instituting or prosecuting a suit in a foreign country or State, where the plaintiff in such suit is fraudulently attempting to evade the laws of this State by subjecting to the payment of his debt property temporarily in the foreign State, when under the law of this State the property is exempt from seizure for his debt."

The Supreme Judicial Court of Massachusetts in *Dehon, &c. v. Foster, &c.*, 4 Allen, 545, in an elaborate opinion, held that an injunction would lie to prevent a citizen of that State from subjecting by attachment a debt due in Pennsylvania to another citizen of Massachusetts, because the effect would be to give them an advantage over other creditors of the debtor, he having made an assignment.

Chief Justice Bigelow says in his opinion: "Inasmuch

as the defendants in the present case are citizens of and residents in this Commonwealth there can be no doubt that the jurisdiction of this court over them is plenary. . . . Nor is the validity of the foreign law or of the lien acquired under it in any manner called in question. . . . An act which is unlawful and contrary to equity gains no sanction or validity by the mere form or manner in which it is done; it is none the less a violation of the law because it is effected through the instrumentality of a process which is lawful in a foreign tribunal."

The same case was again appealed to the court after final hearing in the court below, and the injunction was made perpetual. 7 Allen, 57.

The Supreme Court of New York in *Vail v. Knapp*, 49 Barbour 301, enjoined a citizen of New York from prosecuting a suit in the court of Vermont.

The Supreme Court of Georgia, in *Engel v. Scheuerman*, 40 Ga., 209, sustained an injunction against Scheuerman, a citizen of Georgia, restraining him from collecting a judgment obtained against Engel in the State of New York.

The jurisdiction of the court of New York to render the judgment was not questioned, but it was claimed by Engel that he had been sued in Georgia for the same debt and judgment rendered for part of the claim, which judgment he had paid off, and that Scheuerman had led him to believe by word and act that the suit in New York then pending would be abandoned, but instead of doing so, was about to collect the judgment in New York off of Engel and his securities. We quote as follows from the opinion delivered by Justice Warner: "The States of the American Union, except for all purposes as specified in the constitution of the United States, are, in legal contemplation, foreign to each other. The courts of one State or country can not exercise any control

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or superintending authority over those of another State or country, but they have an undoubted authority to control all persons and things within their own territorial limits. In such cases the courts do not pretend to direct or control the foreign court, but without regard to the situation of the subject matter of the dispute, they consider the question between the parties and decree *in personam*. Story's Equity Jurisprudence, Sec. 899. . . .

"In *Cranstown v. Johnson*, 3 Vesey, Jr., 183, the Master of the Rolls said: 'I will lay down the rule as broad as this: This court will not permit him [the defendant] to avail himself of the law of any other country to do what would be gross injustice.' . . .

"This bill is not filed for the purpose of restraining the proceedings of the court of New York; the courts of this State have no jurisdiction to do that. Nor would the courts of this State have jurisdiction to enjoin the enforcement of a judgment obtained in the courts of New York between citizens of that State, resident there. . . . There is a clear distinction as to the power and authority of a court of equity in this State to restrain by injunction the personal action of a citizen of this State. . . . In the language of the Master of the Rolls in *Cranstown v. Johnson*, this court will not permit the defendant to avail himself of the law of any other country to do what would be gross injustice."

The foregoing authorities establish clearly the power and duty of the courts to prevent citizens within their jurisdiction from evading the laws of such State by and through the machinery of the law or courts of a foreign State. In the case of *Snooks v. Snetzer*, 25 Ohio St., 516, almost the exact question in this case was decided by the Supreme Court of Ohio. Snooks was a creditor of Snetzer. The Baltimore

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& Ohio Railroad Co. owed Snetzer a debt in West Virginia, which was by the laws of Ohio exempt from garnishment or attachment. Snooks instituted suit in West Virginia seeking to subject said indebtedness to the payment of his debt against Snetzer. Snetzer sued out an injunction in Ohio against Snooks to enjoin him from proceeding with his suit in West Virginia. Snooks disregarded the injunction and prosecuted the West Virginia suit to judgment and collected the debt. Snetzer then sued Snooks in the Ohio court to recover back the sum so subjected in the suit in West Virginia, and recovered judgment. Snooks appealed to the Supreme Court of Ohio, which court, after a careful and thorough consideration of the case and the authorities, affirmed the judgment.

It seems to us upon principle as well as authority that if the averments of appellant's petition are true, he is entitled to recover. The judgment of the court below is, therefore, reversed and cause remanded, with directions to overrule the demurrers and for further proceedings consistent with this opinion.

CASE 88—PETITION ORDINARY—MAY 31.

City of Louisville v. Garr by, &c.

APPEAL FROM JEFFERSON CIRCUIT COURT, LAW AND EQUITY DIVISION.

1. SPECIAL LIMITATION LAW—EXTENT OF REPEAL OF GENERAL LAW.

—A local or special law fixing six months as the period of limitation as to actions for damages against a particular city had the effect, as to such actions against the city, to repeal the provision of the general law fixing twelve months as the period of limitation, but did not operate to repeal the saving of the general law

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in favor of infants by which limitation as to them runs only from the time of the removal of their disability.

2. INJURIES FROM DEFECTIVE CONSTRUCTION OF BRIDGE.—In this action against a city to recover damages for personal injuries alleged to have resulted from the defective construction of defendant's bridge, as the testimony tended to show that neither on the approaches nor on the center span of the bridge, which in its narrowest place was some fourteen feet in width, was there any rail or other contrivance to prevent vehicles from colliding with each other; that the approaches were unusually steep, and the floor on one of the approaches so constructed that heavily loaded wagons would trend toward one side, rendering collisions inevitable under circumstances likely to happen in the ordinary use of the bridge by the traveling public, and that these defects caused the injuries complained of, the proof was sufficient to support the verdict for plaintiff.

H. S. BARKER, CITY ATTORNEY, IN PETITION FOR REHEARING.

(Brief not in record.)

The saving in favor of infants contained in the General Statutes should not be imported by construction into the special or local statute. The same rule ought not to apply to the city that operates on individuals and private corporations. (Session Acts 1881-2, vol. 1, 1017; *Preston v. The City of Louisville*, 84 Ky., 119; *Covington v. Hoadley*, 83 Ky., 444; *Covington v. Voskotter*, 80 Ky., 219; *O'Bannon v. L. C. & L. R. Co.*, 8 Bush, 348; *Woods on Limitation* (2d Ed.), sec. 252; *Angell on Limitation*, sec. 194; *American & Eng. Ency. of Law*, vol. 13, 735; *Beckfort v. Wade*, 17 Vesey, Jr., 92; *Amy v. Watertown*, 130 U. S., 325; *Vance v. Vance*, 108 U. S., 521; *Bank of the State of Alabama v. Dalton*, 9 Howard, 529; *The Sam Slick*, 2d Curtis, 485; *McIver v. Ragan*, 2 Wheaton, 25; *Mobley v. Oeker*, 3d Yeates, Penn., 201; *Warfield v. Fox*, 53 Penn. St., 382; *Howell v. Hair*, 15 Ala., 194; *Favorite v. Booher*, 17 Ohio St., 548; *Pryor v. Ryburn*, 16 Ark., 671; *Bennett v. Worthington*, 24 Ark., 487; *Sims v. Cumby*, 53 Ark., 491; *Bucklin v. Ford*, 5 Barb., N. Y., 393; *Wells v. Childs*, 12 Allen, 333; *Baines v. Williams*, 3 Iredell, N. C. (Law), 481; *Dozier v. Ellis*, 28 Miss., 730; *Sacia v. De Graff*, 1 Coward, 356; *The State ex rel. Ullin v. Allen*, 82 Ind., 543; *Miller v. Lesser*, 71 Iowa, 147; *In re John W. Griffith* (Habeas Corpus), 35 Kan., 337; *Chicago & Northwestern R. v. Jenkins*, 103 Ill., 588; *Morgan v. Des Moines*, 54 Federal Reporter, 456; *Morgan v. Des Moines*, 60 Federal Reporter, 208; *Arterburn's exrs. v. Young*, 14 Bush, 509.)

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HARGIS & TURNER, JR., FOR APPELLEE.

1. That part of the city charter which fixes the limitation of such actions as this at six months is *itself an exception* to the general law of limitation and is an exception only to the extent expressly stated in the charter of the city. The general law applies except in so far as inconsistent with the charter provision. (Dillon on Mun. Corp. (3d Ed.), secs. 87, 88.)
2. The evidence in this case sustains the verdict beyond all reasonable doubt, and the case of Board of Int. Imp. of Shelby county v. Searce, 2 Duv, 576, furnishes the law applicable to it.

MATT O'DOHERTY ON SAME SIDE.

1. The law was correctly given to the jury. (Board of Internal Imp. of Shelby County v. Searce, 2 Duv., 576.)
2. There was no limitation as to any action at common law. (Wood on Limitation of Actions, sec. 2.)
3. The charter provision was merely an amendment to the general limitation law, and was not intended to repeal the saving of the general law in favor of persons under disability. (Gen. Stats., chap. 71, art. 3, sec. 3; *Idem.* Art. 14, sec. 2; Wood on Limitation, sec. 6, p. 11.)

JUDGE HAZELRIGG DELIVERED THE OPINION OF THE COURT.

Section 3, of article 3, chapter 71, of the General Statutes, provides that "an action for an injury to the person of the plaintiff, or of his wife, child, ward, apprentice or servant, or for injuries to person . . . by any company or corporation . . . shall be commenced within one year next after the cause of action accrued, and not thereafter."

Section 2, of article 4, same chapter, provides that "if a person entitled to bring any of the actions mentioned in the third article of this chapter, except for a penalty or forfeiture, was, at the time the cause of action accrued, an infant . . . the action may be brought within the like number of years after the removal of such disability . . . that is allowed to a person having no such impediment to bring the same after the right accrued."

These sections embraced the law on the subject of limitation of actions for personal injuries in force throughout the State in March, 1882, and were, therefore, applicable to actions for such injuries against the city of Louisville. At the date named, however, the General Assembly, in the form of an amendment to the charter of the city of Louisville, adopted the following:

"No actions for damages of any character whatever, to either person or property, shall be instituted or maintained against the city unless such action be commenced within six months after the accrual of the cause of action." It will be observed that in this amendment no reference is made to the section fixing twelve months as the limitation of such actions, and it is evident none was needed. The special law was inconsistent with the general one and hence effected its repeal. But it did no more than that. It did not repeal or modify the general law then in force in the city, and the State as well, found in section 2, article 4, by which an infant might bring its action after removal of its disability, within a like number of years allowed to persons not under disability after their right of action accrued. It seems to us that the only effect the amendment was intended to have by the legislature was to change the time from twelve months to six months, within which actions against the city of Louisville might be brought, and that the General Statutes saving the rights of infants, as found in the subsequent article and section quoted, was left unaffected. Certainly there was no express repeal of this reasonable and just statute on behalf of infants, and we find no good reason to adjudge its repeal by implication.

As aptly stated by counsel, "that part of the city charter which fixes the limitation of such actions at six months is itself an exception to the general law of limitation, and is

an exception only to the extent expressly stated in the charter of the city, because the general law of limitation applies to all persons or corporations, unless they are expressly exempted from the operation of the statute."

We are aware of the general rule that when infants, married women and persons of unsound mind are not especially excepted from the operation of statutes of limitation, they are barred just as persons not under disability. The exemptions usually accorded these persons do not rest upon any general doctrine of the law requiring them to be put on a more favorable footing than others. But here we have a particular modification with reference alone to the time within which certain actions may be brought, and no modification of certain other general laws, which provide a saving of the rights of infants.

The cases cited by counsel for the city are in line with the general rule, which, as we have said, we recognize, but they are not at all similar to the case at hand.

This action was brought by the appellee, as next friend of the infant, Urith L. Garr, within about seven months after she was injured through the defective construction of the appellant's bridge, and the demurrer to the city's plea of limitation was properly overruled.

On the trial of the case the plaintiff introduced proof tending to show that neither on the approaches nor on the center span of the bridge, which, in its narrowest place, was some fourteen feet in width, was there any rail, beam or other usual contrivance to prevent vehicles from colliding with each other. That the approaches were unusually steep, and the floor on the eastern approaches was so constructed that heavily loaded wagons would trend toward one side, rendering collisions inevitable, under circumstances likely to happen in the ordinary use of the bridge by the traveling

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public, and that these defects caused the injury complained of. We think the proof sufficient to support the verdict of the jury. No serious complaint is urged against the instructions. They fully embrace the law of the case.

Judgment affirmed.

To a petition for rehearing, filed by counsel for appellant, Judge Hazelrigg delivered the following response of the court, November 12, 1895:

The contention of counsel involves the assumption that the charter amendment of March, 1882, embraces the whole law on the limitation of actions against the city for damages to person or property. If so, then the right of one who may die before limitation has run is not preserved to his representative (sec. 3, art. 4, General Statutes); nor are the rights of aliens and subjects of a country at war with the United States protected (sec. 11, *ib.*), nor of one confined in the penitentiary, and, therefore, unable to sue (sec. 13, *ib.*), nor of a party restrained by injunction or delayed by vacancy in office, the absence or refusal of an officer to act, etc. (sec. 21, *ib.*), nor when action fails for want of jurisdiction after commencement thereof in due time (sec. 22, *ib.*).

These modifications of the general law are found in company with the one preserving the rights of infants, etc., until after a certain period from the removal of their disability. A literal reading of the amendment would prevent the application of any of those exceptions or modifications to actions brought against the city, and induce a construction wholly repugnant to the manifest intent of the general law on the subject. The amendment is not to be thus separated or isolated from the great body of laws of which it forms a part, but must be construed with reference to the comprehensive and just system prevailing in the State.

This amendment provides that fines for all misdemeanors committed in the city of Louisville shall, when collected, be paid into the treasury of the city, but in *Bartour v. City of Louisville*, 83 Ky., 95, this court held that the provision must be examined in the light of the general policy of the legislation on that subject.

If we cling to the letter of the amendment we must abandon the well-settled policy of our law with regard to the rights of infants and others under disability, and such, we can not think, was the legislative intent.

In the case of *Morgan v. The City of Des Moines*, 60 Federal Reporter, 208—a case relied on by counsel for appellant—the act fixing the limitation was not a local but a general act. The legislature had the whole subject before it of “limiting the time of making claims and bringing suits against municipal corporations,” and must be supposed to have dealt fully with it. Besides, in note 1, page 476, of *Wood on Limitation*, it is said: “Infancy is within the saving clause of all the statutes except in Iowa, where there is no exception in favor of disability except in cases of real actions, etc.,” and while the revision of 1880, referred to in the case cited, changed this, there was no well-settled policy in force preserving the rights of infants when the act limiting the time for bringing suits against municipal corporations to six months was enacted. Indeed, the policy had been quite the reverse.

Whether sec. 2752 of the Kentucky Statutes, part of the act of July, 1893, for the government of cities of the first class, limiting such actions to six months, was intended to affect the statutory modifications then in force is a question not now involved and is not decided.

Petition overruled.

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CASE 89—PETITIONS AND INFORMATION—JUNE 1.

Commonwealth for use, &c v. Farmers' Bank
of Kentucky.

Commonwealth for use, &c v. Bank of Ken-
tucky.

Commonwealth for use, &c v. Deposit Bank
of Frankfort.

Commonwealth for use, &c v. Frankfort
National Bank.

Commonwealth for use, &c v. State National
Bank.

City of Louisville, &c v. Bank of Kentucky.

City of Covington v. First National Bank of
Covington.

City of Covington v. German National Bank
of Covington.

Farmers' Bank of Kentucky v. City of
Frankfort.

Farmers Bank of Kentucky v. County of
Franklin.

Bank of Kentucky v. Armstrong, Sheriff.

Bank of Kentucky v. City of Frankfort, &c.

Deposit Bank of Frankfort v. Franklin
County, &c.

Third National Bank v. City of Louis-
ville, &c.

Louisville Banking Company v. City of
Louisville, &c.

Northern Bank of Kentucky v. Bourbon
County, &c.

Farmers' Bank of Kentucky v. City of
Henderson.

APPEALS FROM FRANKLIN AND OTHER CIRCUIT COURTS.

1. EXEMPTION OF BANKS FROM MUNICIPAL TAXATION—IRREVOCABLE
CONTRACT BY STATE.—The written acceptance by the various

97	590
102	179
102	209
97	590
102	433
97	590
111	950

banks of the State of the provisions of the Hewitt revenue law, under which they were to pay into the State Treasury a certain tax in full of all tax, State, county and municipal, constituted an irrevocable contract between the banks and the State, some of the banks having thereby surrendered the right which they had under their charters to pay into the State Treasury a still smaller rate of taxation in lieu of all other taxes; and therefore the banks which entered into that contract are exempt from taxation by the counties, towns and cities of the State, the provisions of the present revenue law authorizing such taxation being in violation of the provision of the Federal constitution that "no State shall pass any law impairing the obligation of contracts."

2. **SAME.**—The provision of sec. 6 of article 2, chapter 92, of the General statutes (the Hewitt revenue law), that "this act shall be subject to the provisions of sec. 8, chapter 68, of the General Statutes," which is known as the Act of 1856, and which authorizes the amendment or repeal of all grants to corporations, was not intended to authorize the legislature to divest contract rights acquired under the article in which that section appears, although the word "act" is used in the sense of article, there being a manifest distinction between the power of the legislature to repeal an act and the right to annul, by repeal or otherwise, a contract made under it, and it being besides expressly provided by the Act of 1856 that "no amendment or repeal shall impair other rights previously vested."
3. **POWER OF STATE TO CONTRACT AS TO TAXATION.**—While under our present constitution the State has no power to make such a contract, yet under the former constitution this power existed, and property might not only be classified in imposing taxation, but the State could discriminate between the classes when providing the rate of taxation.

HUMPHREY & DAVIE AND HELM & BRUCE FOR BANK OF KENTUCKY, THIRD NATIONAL BANK AND LOUISVILLE BANKING COMPANY.

1. Prior to the Hewitt act of 1886 the old banks (incorporated before 1856), had charter contracts, by which their taxes were commuted, and under which they could only be made to pay fifty cents on the \$100; the National banks, under the Act of Congress, could not be taxed any higher than those State banks; and the new State banks (those incorporated since 1856), could not be taxed higher than the other banks, because it would be a violation of the constitutional requirement of uniformity and equality in taxation. (*Franklin County v. Bank of Kentucky*, 87 Ky., 370;

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Farmers' Bank v. Commonwealth, 6 Bush, 127; Covington City National Bank v. Covington, 21 Fed. Rep., 484; National Bank v. Paducah, 10 Ky. Law Reporter, 21; Lexington v. McQuillan's heirs, 9 Dana, 516.)

2. The Hewitt act of 1886 sought to accomplish two wise things: first, to obtain an agreement from the banks by which the revenue of the State would be increased by raising this tax commutation-contract from 50 cents to 75 cents on the \$100; and, second, to produce and preserve that equality in the taxation of banking capital all over the State which is essential to prevent the financial institutions in one locality, where local taxation is light, from driving out those in cities where local taxation is many times heavier. To accomplish these things the act of 1886 proposed a contract with all the banks by which, "during the corporate existence of the banks," they would surrender their rights or claims to be taxed only 50 cents, and agree to pay 75 cents; and by which the State would agree, in consideration thereof, not to harass, cripple or destroy their usefulness by changes, or constant threats of changes, in the tax rates, as to them, "during the corporate existence of the banks." (Acts 1885-6, vol. 1, page 142.)
3. The Hewitt act of 1886 was, in express terms, a contract. It was "an agreement to and with the State of Kentucky" and the banks, made in the most solemn and deliberate manner, and evidenced in the most exact and contractual forms on both sides. It was binding on both alike, and could not be avoided by either. (New Jersey v. Yard, 95 U. S., 115; Knoop v. State of Ohio, 16 How., 369.)
4. The provision in the Hewitt act that "this act" shall be subject to the act of 1856 (which reserved the legislative right to repeal all acts), did not purport to reserve the right to the State to repudiate or violate the contract thus made under the "act," but only reserved the right in future to repeal the "act" itself, so as to prevent further contracts being made under it, after the repeal. The subsequent repeal of the act by the new constitution of 1891, did not affect the contract with the banks, made under it while it was in force; any more than the subsequent revocation of a power of attorney would invalidate deeds made under it, before its revocation. (Fletcher v. Peck, 6 Cranch, 135; Pac. Steamship Co. v. Joliffe, 2 Wallace, 450; Commonwealth v. Owensboro R., 95 Ky., 61; Sinking Fund v. Green R. Nav. Co., 79 Ky., 73; Gregory's Executors v. Trustees Shelby College, 2 Met., 598; Orr v. Bracken County, 81 Ky., 593.)
5. The extension of the charters of the banks from time to time did not destroy the identity of the corporations, nor create new and different beings; but the same beings, with the same identity.

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characteristics, powers, contract-rights and vested rights, continued to exist, as before; and the commutation-contract with the State continued to exist as before. (Franklin County v. Bank of Kentucky., 87 Ky., 387.)

6. There was nothing in the Kentucky constitution which forbade the State from making that contract with the banks in 1886. To make a contract, for the valuable consideration of obtaining an increase of taxes, was not a violation of the constitutional provision that "all freemen, when they form a social compact, are equal and no man or set of men are entitled to exclusive, separate public emoluments or privileges from the community," etc. (Knoop v. State of Ohio, 16 How., 369; Farrigan v. Tennessee, 95 U. S., 632; Franklin Co. v. Bank of Kentucky, 87 Ky., 370; Commonwealth v. Whipps, 80 Ky., 272; Williams v. Kammack, 61 American Decisions, 513.)
7. If the State had the power to cancel this contract and resume its former position, the banks, also, would be restored to their former attitude; and their contract right to pay only 50 cents on the \$100 would revive. Section 464 of the Kentucky Statutes, providing that when a "law" which has repealed a former "law," shall itself be repealed, it shall not revive the previous "law," does not prevent this revival; for, here, would not be the repeal of a "law" but merely the cancellation of a contract, by which a former contract had been suspended. (Louisville Water Co. v. Clark, 143 U. S., 1.)
8. These principles, and these contract rights of the banks, having been settled by repeated adjudications of this court, and large interests in the community having been built up in reliance upon these settled precedents, the doctrine of *stare decisis* should prevail. Nothing is so dangerous as a new departure in legal decisions; for, different from statutory changes, they are retrospective in their operation; and, "in matters of constitutional rights especially, it is the duty of the courts to keep the scales of justice even and steady, and not liable to waver with every new judge's opinion." (Orphan Asylum v. Tax Collector, 37 La. Ann., 68.)

D. W. LINDSEY FOR THE BANK OF KENTUCKY.

1. The agreement between the Commonwealth and the Bank of Kentucky under the Hewitt revenue law constituted an irrevocable contract, the consideration for the contract consisting in the waiver by the bank of the contract right which it had under its charter to a different mode and smaller rate of taxation. (Johnson v. Commonwealth, 7 Dana, 442; Farmers' Bank v. Commonwealth, 6 Bush, 127; Franklin County v. Bank of Kentucky, 87 Ky., 370.)

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2. The insertion of sec. 6 of art. 2, of the Hewitt revenue law had no force whatever. Without that section the law would have been read as if the provisions of the act of 1856 were incorporated in it. (*Griffin v. Ky. Ins. Co.*, 3 Bush, 592; *Louisville Water Co. v. Clark*, 143 U. S., 12; *New Jersey v. Yard* 95, U. S., 104.)
3. But reading the provisions of the act of 1856 as a part of the Hewitt revenue law, as must be done, they can not be regarded as indicating an intention upon the part of the legislature to reserve the right to abrogate the contracts it proposed to make with the banks. (*New Jersey v. Yard* 95, U. S., 104; *Commissioners of Sinking Fund v. Green and Barren River Nav. Co.*, 79 Ky., 73; *Commonwealth v. Owensboro &c. R. Co.*, 15 Ky. Law Rep., 455; s. c., 95 Ky., 60.)
4. If, however, the State can abrogate its contract with the Bank of Kentucky, the bank is restored to its contract rights which it agreed to surrender in consideration for the promise and pledge of the State now withdrawn. (*Louisville Water Co. v. Clark*, 143 U. S., 1.)

WM. GOEBEL FOR THE COVINGTON BANKS.

1. The repeal of a statute does not affect a contract made under its authority before the repeal. (*Board of Sinking Fund Comms. v. Green & Barren River Nav. Co.*, 79 Ky., 81-83; *Railroad Companies v. Commonwealth*, 15 Ky. Law Rep., 454; s. c., 95 Ky., 60; *Orr v. Bracken County &c.*, 81 Ky., 593; *Sage v. Dillard*, 15 B. M.; *Sinking Fund Cases*, 99 U. S., 700.)
2. By the express terms of the proviso of the act of 1856 the contracts between the Commonwealth and appellees made under and in accordance with sec. 4, article 2, of the Hewitt revenue act are excepted out of the reservations of power to amend or repeal (*Board of Sinking Fund Comrs. v. Green & Barren River Nav. Co.*, 79 Ky., 83.)
3. It was the legislative intention to authorize the making of a contract by sec. 4, article 2, of the Hewitt act. (*New Jersey v. Yard* 95, U. S., 104.)
4. There was a consideration for the contract relied on by the banks. (*State Bank v. Knoop*, 16 How., 360.)

The General Assembly is the sole judge of the amount of consideration for any contract it makes or authorizes upon behalf of the State. (*Barbour v. Board of Trade*, 82 Ky., 645.)

JAMES W. BRYAN FOR SAME BANKS.

The revenue act of May 17, 1886, and the acceptance of its

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provisions by the banks, constitute a contract which could not be impaired by any subsequent legislation of the State. (Act of Feb. 20, 1835, chartering Northern Bank of Kentucky; Act of 1834, chartering Bank of Kentucky; Act of Feb. 15, 1858, extending bank charters; Act of 1872, extending charter of Bank of Kentucky; Act of 1884, extending charter of Northern Bank of Kentucky; Act of 1850, chartering Farmers' Bank and Act of March 10, 1876, extending charter; Louisville Savings Bank &c. v. Commonwealth, 14 B. Mon., 329; National Bank Act of June 3, 1864; Act of Feb. 9, 1865, for taxation of banks; Commonwealth v. First National Bank of Louisville, 4 Bush, 98; sec. 8, chapter 68, General Statutes, known as "Act of 1856"; Franklin County &c., v. Banks, 87 Ky., 375; Farmers' Bank of Kentucky v. Greenup County, &c., 6 Bush, 127; City National Bank of Paducah v. City of Paducah, 10 Ky. Law Rep., 222; The Fuqua Branch of State Bank of Ohio v. Knoop, 16 How., 368; State of New Jersey v. Yard, 95 U. S., 104; Farrington v. Tennessee, 95 U. S., 679.)

The reference in the Hewitt revenue act to the act of 1856 gave the Legislature no greater power to change that law or the contract under it than it would have had without such reference. (Griffin v. Kentucky Ins. Co., 3 Bush, 592; Greenwood v. Railroad Co., 105 U. S., 13.)

By the act of 1856 legislative control of all future statutes was reserved "unless a contrary intent be therein plainly expressed;" and it is expressly provided that "no amendment or repeal shall impair other rights previously vested." The legislature by the Hewitt revenue act has "plainly expressed" its intent that this contract should continue during the corporate existence of the banks accepting it.

G. C. LOCKHART AND J. D. HUNT FOR NORTHERN BANK OF KENTUCKY.

The charter of the Northern Bank of Kentucky was an irrevocable contract with the State covering the questions in issue, and this irrevocable contract was continued in full force by the acts extending the charter. At the time of the enactment of the "Hewitt Law" this right of the bank was complete and extended during the life of its charter till May, 1905. Nevertheless, the bank did accept the "Hewitt Law" in good faith, believing that its enactment was intended to inaugurate a permanent legislative policy governing the taxation of the banks that should accept its terms, and to continue at least during the corporate existence of the assenting banks. Therefore, the Hewitt act and its acceptance was and is a contract binding on the State. But if the court should for any reason rule adversely on this submis-

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sion the appellant submits that it is entitled to its charter rights unimpaired. (Session Acts, 1834-5, p. 166; 1 Session Acts, 1857-8, p. 55; 1 Session Acts, 1883-4, p. 552; Session Acts, 1835-6, p. 143; 1 Session Acts, 1885-6, pp. 144-147; Johnson v. Commonwealth, 7 Dana, 338; Farmers' Bank v. Commonwealth, 6 Bush, 128; Franklin County v. Bank of Kentucky, 87 Ky., 370; Tennessee v. Whitworth, 117 U. S., 139; Humphrey v. Pegnes, 16 Wall, 244; Smith on Contracts, 181; Chitty on Contracts, 44, 45; 1 Parsons on Contracts, book 2, chap. 1, sec. 9.)

KNOTT AND EDELEN FOR STATE NATIONAL BANK OF FRANKFORT, KENTUCKY.

1. The State has no power under the national bank act, as construed by the Supreme Court, to levy a tax on the assets of National banks, their power being limited to a taxation on the *shares* and to a taxation on the real estate of the bank. (McCulloch v. Maryland, 4 Wheat, 316; Rev. Stats. U. S., secs. 5210, 5214, and 5219; National Bank v. Commonwealth, 9 Wall., 353; Rosenblatt v. Johnson, 104, U. S., 462; Covington City National Bank v. City of Covington, 21 Fed. Rep., 484; St. Louis Banks v. Papin, 4 Dillon, 29; Smith v. Bank &c., 17 Mich., 479; City of Pittsburgh v. First National Bank, 55 Pa., St., 45.)
2. No power exists without the consent of Congress—which has not been given—to impose a tax on the franchises of national banks. (California v. The Railroads, 127 U. S., 1.)

In Farrington v. Tennessee, 95 U. S., 679, the bank sought to be taxed was chartered by the State of Tennessee.

FRANK CHINN FOR DEPOSIT BANK OF FRANKFORT.

The Deposit Bank of Frankfort had a valid exemption at the time it accepted the provisions of the Hewitt law, and the surrender of this exemption by the bank was a sufficient consideration to support the contract under which by the terms of that law it was to be exempt from all other taxation. Besides, the amount exacted by the State from the bank was nearly double that required of other tax-payers, which was a sufficient consideration to support the contract. (Franklin County Court v. Deposit Bank of Frankfort, 87 Ky., 370; Commonwealth v. Owensboro &c., R. Co., 95 Ky., 60; Commissioners of Sinking Fund v. Green & Baren River Nav. Co., 79 Ky., 73; New Jersey v. Yard 95, U. S., 104; Farrington v. Tennessee, 95 U. S., 679.)

JNO. W. RODMAN FOR FARMERS' BANK.

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WM. J. HENDRICK, ATTORNEY GENERAL FOR COMMONWEALTH.

1. The Bank of Kentucky (selected as the "most favored" of State banks), never had a contract with the State so far as exemption from taxation is concerned.
2. If it ever had one its validity and operation could not extend beyond the limit of its original charter. A renewal will not avail.
3. The claim made by the bank here is for a grant of a separate and exclusive privilege inhibited by the third section of the Bill of Rights, and the claim is also in violation of sec. 174 of the State constitution which requires uniformity of taxation and taxation according to value. (*Holzhauser v. City of Newport*, 15 Ky. Law Rep., 188.)
4. The doctrine of *Trustees v. Woodward*, 4 Wheat., so far as it declares that a charter is a contract was a fallacy to begin with, and is no longer recognized authority in this court or the Supreme Court of the United States on that point. (*Chas. River Bridge v. Warren River Bridge*, 11 Pet., 536; *Richmond R. Co. v. Louisa R. Co.*, 13 How., 71; *Railroad Co. v. Fuller*, 17 Wall., 560; *Chicago R'y Co. v. Iowa*, 94 U. S., 115; *Peak v. Chicago R'y Co.*, 94 U. S., 164-167; *Union Pacific R'y v. United States*, 99, U. S., 700; *Stone v. Miss.*, 101 U. S., 623; *Fertilizing Co. v. Hyde Park*, 97 U. S., 659; *Beer Company v. Mass.*, 97 U. S., 623; *Powell v. Pennsylvania*, 127 U. S., 678; *Cov. & Cincinnati Bridge Co. v. Kentucky*, 154 U. S., 204; *Stone v. Farmers' Loan & Trust Co.*, 116 U. S., 636; *Stone v. Ill. Cent.*, 116 U. S.; *Delaware R. Tax Cases*, 18 Wall., 206; *Ga. Banking Co. v. Smith*, 128 U. S., 174; *Budd v. The People of New York*, 146 U. S.; *West River Bridge Co. v. Dix*, 6 How., 507; *Thorpe v. Rutland R.*, 27 Vt., 140; *Cov. & Lex. Turnpike Road Co. v. Commonwealth*, 14 Ky. Law Rep.; *Douglass v. Commonwealth*, 15 Ky. Law Rep.; *Chattaroi R. Co. v. Kinner*, 81 Ky., 221.)

Cases in Kentucky in which *Trustees v. Woodward* has been followed: *City of Louisville v. University of Louisville*, 15 B. M., 642; *Gregory v. Trustees Shelby Co.*, 2 Met., 589; *Hamilton v. Keith*, 5 Bush, 548; *Wendover v. City of Lexington*, 15 B. M., 258; *L., C. & L. R. Co. v. Commonwealth*, 10 Bush, 43; *Commissioners of Sinking Fund v. Green & Barren River Nav. Co.*, 79 Ky., 73.)

5. On the question of repeal, general and special, consider: *Sage v. Dillard*, 15 B. M., 340; *Griffin v. Ky. Ins. Co.*, 3 Bush, 592; *Simpson County Court v. Arnold*, 7 Bush, 353; *C. & O. R. Co. v. Barren County*, 10 Bush, 604; *Orr v. Bracken County*, 81 Ky., 593.
6. The government which creates corporations may reserve the power to destroy them or to prescribe the conditions upon which their future or continued existence shall depend. (*Railroad Company*

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v. Maryland, 21 Wall., 471; McCulloch v. Maryland, 4 Wheat, 427; Providence Bank v. Billings, 4 Pet., 513; Bank of Commerce v. New York City, 2 Black, 620; Bank of Veazie v. Fenno, 8 Wall., 533; Turnpike Co. v. State, 3 Wall., 210.)

7. In the construction of charters in which a grant against common right is claimed, the affirmative must be shown beyond doubt or question. (Fertilizing Co. v. Hyde Park, 97 U. S., 659; Pennsylvania Co. v. Commissioners, 21 Pa. St., 9; Bank v. Tennessee, 104 U. S., 493.)

IRA JULIAN FOR COUNTY OF FRANKLIN, HUGH RODMAN FOR CITY OF FRANKFORT, AND W. H. JULIAN FOR SAID COUNTY AND CITY.

1. The legislature having by the charters of the Deposit Bank and Farmers' Bank expressly reserved the right to repeal or amend those charters, there was no consideration as to those two banks for a contract under the Hewitt bill, even if those two charters were not subject to the provisions of the act of 1856.

2. The renewed charter of the Bank of Kentucky being subject to the provisions of the act of 1856, was not a contract, and the court is asked to review and modify the opinion in Franklin County Court v. Bank of Kentucky, 87 Ky., 376, in so far as it holds otherwise.

Where exemption from taxation exists it lasts only during the continuance of the charter, and unless *expressed* when the charter is renewed and extended the power to tax revives. (2 Houston's Rep., 121; 146 U. S., 294; Desty on Taxation, vol. 1, p. 142.)

Even if the legislature intended that the extension of the charter of the Bank of Kentucky should be a contract it was beyond its power to make such a contract at that time. (Lancaster v. Clayton, 86 Ky., 373; Tucker v. Ferguson, 22 Wall., 575.)

3. But whatever contract right of exemption from taxation the Bank of Kentucky may have possessed by virtue of its charter anterior to 1836, the same was waived and released by that bank's acceptance of the Hewitt Bill, including sec. 6 of article 2 thereof.
4. Neither the constitution of the United States nor any act of congress inhibits a State from taxing the property and franchises of National banks. (National Bank v. Commonwealth, 9 Wall., 353; Davenport Bank v. Davenport Board of Equalization, 123 U. S., 83; 18 Wall.; 5. 95 U. S., 19; 1 Thompson's Nat. Bank Cases, pp. 658 and 673.)

H. S. BARKER, CITY ATTORNEY OF LOUISVILLE.

1. The language granting exemptions from taxation is to be strictly construed: all doubts are to be resolved in favor of the State. (Cooley on Taxation, 2d edition, pp. 204-5; Tomlinson v. Jessup, 15 Wall., 454-7; Endlich on Int. of Statutes, secs. 354, 356.)

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2. The fact that a contract gives to one party the exclusive right to terminate it at his pleasure does not rob the contract of the element of mutuality. (*Griffin v. Ky. Ins. Co.*, 3 Bush, 592; *Clark v. Louisville Water Co.*, 143 U. S.)
3. Sec. 6 of article 2 of the Hewitt law applies to the contract between the State and the banks. That section could not have been intended to apply to the gratuitous exemptions in sec. 9 of article 1, as the legislature had the right to withdraw such exemptions without the reservation of the right. (*Cooley on Taxation*, p. 69.)
4. If sec. 6 does refer to article 2 and the contract therein contained, the State has the power to withdraw from the contract. (*Griffin v. Ky. Ins. Co.*, 3 Bush; *Clark v. Louisville Water Co.*, 143, U. S.)
5. The immunity from taxation involved herein is not a *vested right* within the proviso of sec. 8, chapter 68, General Statutes. (*Clark v. Louisville Water Co.*, 143, U. S.; *Cumberland & Ohio R. Co. v. Barren County*, 10 Bush, 606.)
6. If the Hewitt bill is repealed the banks whose charters ante-date the act of 1856 are not relegated to their original charters with reference to taxation. They voluntarily surrendered up their irrevocable contracts and made new ones which could be revoked. (*Clark v. Louisville Water Co.*, 143 U. S.; *Gen. Stats.*, chap. 92, art. 2, sec. 4.)
7. National banks may be taxed by the State just as other banks are taxed. (*City National Bank of Paducah v. City of Paducah*, 10 Ky. Law Rep. 221; *Covington City Nat'l Bank v. Covington*, 21 Fed. Rep., 484; 16 Am. & Eng. Enc. of Law, p. 190; *Burroughs on Taxation*, p. 127; *Hilliard on Taxation*, 248; *Lionberger v. Rouse*, 9 Wall., 468; *Mercantile Nat'l Bank of New York v. Mayor of New York*, 121 U. S., 138.)

CLIFTON ARNSPARGER AND RUSSELL MANN FOR BOURBON COUNTY.

W. C. P. Breckinridge and J. R. Morton for cities and counties, filed petition for rehearing, which was overruled.

CHIEF JUSTICE PRYOR DELIVERED THE OPINION OF THE COURT.

The Bank of Kentucky, the Northern Bank, the Farmers Bank and other State banks, the National Bank of Covington and other national banks are in this court by their presidents and directors, some of them appealing from judgments imposing upon them taxation for county and municipi-

pal purposes, and others standing as appellees in cases relieving them from such local burdens.

The legislation imposing such burdens is found in the Kentucky Statutes under the *title of Revenue and Taxation*, and is based on secs. 174 and 175 of the present constitution.

Sec. 174 provides: "All property whether owned by natural persons or by corporations, shall be taxed in proportion to its value, unless exempted by this constitution, and all corporate property shall pay the same rate of taxation paid by individual property. Nothing in this constitution shall be construed to prevent the General Assembly from providing for taxation based on incomes, licenses or franchises."

Sec. 175 provides: "The power to tax property shall not be surrendered or suspended, by any contract or grant to which the Commonwealth shall be a party."

It is manifest by reason of sec. 175 the right of the legislature no longer exists of surrendering the power to tax property, or by contract to bind the State to any other mode of taxation than that found in the constitution, and all property, whether belonging to corporations or individuals, must pay the same rate of taxation.

The appellants in these cases (the banks) are claiming that prior to the adoption of the present constitution a contract had been entered into between them and the State, by which, in consideration of the surrender by them of certain rights found in their respective charters, and by their consent and agreement to pay a larger State tax than individuals paid, or their charters required, the State agreed not to impose upon them any local burdens, and the important inquiry in these cases is: Was such a contract entered into between the banks and the State based on a consideration, binding the State on one side and the banks on the other?"

The statute under which this contract is claimed to have been made is found in the General Statutes under the title of revenue and taxation, secs. 1 and 4, of art. 2, and known as the Hewitt bill. Counsel for the banks in the discussion of these cases classified the banks as follows: 1. The banks chartered prior to the act of 1856, when the power to amend or repeal was not a part of the charter or reserved by any general law. 2. Banks chartered after that date, when by a general law the right to amend or repeal the charter was expressly reserved. 3. The national banks. We shall treat all the cases as one in considering the application of the Hewitt act to the banks accepting its provisions.

Prior to the adoption of the present constitution it seems to have been the settled policy of the State to exempt banking institutions from local taxation, and requiring them to pay a larger tax to the State upon its property than that paid by the individual tax-payer, and this additional tax went into the State Treasury instead of being applied to municipalities in the discharge of local burdens. The framers of the constitution, not approving of this policy, established a fixed rule of taxation and made all taxation alike upon property, whether for State or municipal purposes, applying the rule for municipal purposes to the territory in which the tax is imposed. It is argued, and no doubt true, that a discrimination must exist between banks located where heavy local burdens are imposed, and like institutions in more favored localities, where lighter or no local burden exists, and while the fact that the banks in the commercial centers of the State are taxed two and a quarter dollars on the hundred, under the present system (local and State), and those in an adjoining town or county only one per cent., may work a hardship, and prevent competition, or drive

the banks thus heavily taxed to locate elsewhere, yet this, under the old system, was a question of policy only, and the framers of the present constitution, in adopting the ad valorem system, left no room for classifying property, so as to make any discrimination in the subjects of taxation, and the suggestion of counsel can only be considered in determining the intent of the legislature in passing the Hewitt act and that of the banks in accepting it.

It may be well however to ascertain the condition of the banks (and particularly those chartered before the year 1856), with reference to taxation, and the circumstances attending the legislation resulting in the passage of the Hewitt bill, in order to ascertain whether or not it was the purpose of the State to surrender in part its power of taxation, and that of the banks to relinquish any right they could have asserted against the State by reason of their charters. The banks in existence prior to the act of 1856 were claiming their charter contracts by which only a tax of fifty cents on each share of one hundred dollars of stock could be imposed.

The national banks claimed they were entitled to be taxed like the State banks, and were not liable for local burdens, and besides, that their surplus, if in greenbacks or other non-taxable securities, could not be taxed under their charters from the Federal Government.

The State claimed the old banks were taxed for too small an amount, and the banks chartered since the year 1856 were resisting any discrimination between such institutions and the old banks. Under these circumstances the legislature devised a mode of taxation that prevented a discrimination that would otherwise exist, and by the provisions of the Hewitt bill said to all the banks, State and national, we will impose a tax of seventy-five cents on each share of

your capital stock equal to one hundred dollars, and in addition a tax on your surplus, and this shall be in full of all tax, State, county and municipal, provided you will accept the act imposing the tax with the conditions annexed.

This act reads: "Shares of stock in State and national banks and other institutions of loan and discount, and in all corporations required by law to be taxed on their capital stock, shall be taxed seventy-five cents on each share thereof, equal to one hundred dollars of stock therein, owned by individuals, corporations or societies, and said banks, institutions and corporations shall, in addition, pay on each one hundred dollars of so much of their surplus, undivided surplus, undivided profits, or undivided accumulations, as exceeds an amount equal to ten per cent. of their capital stock, the same rate of taxation that is assessed upon real estate, which shall be in full of all tax, State, county and municipal." The seventh section of the act further providing that "nothing herein contained shall be construed as exempting from taxation for county or municipal purposes any real estate or building owned and used by said banks or corporations for conducting their business, but the same may be taxed for county and municipal purposes as other real estate is taxed."

Section 4 of this act provides: "That each of said banks, institutions, and corporations, by its proper corporate authority with the consent of a majority in interest of a quorum of its stockholders at a regular meeting thereof, may give its consent to the levying of said tax, and agree to pay the same as herein provided, and to waive and release all right under the act of Congress, or under the charters of the State banks, to a different mode or smaller rate of taxation, which consent or agreement with the State of Kentucky shall be evidenced by writing under the seal of such bank, and

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delivered to the Governor of this Commonwealth, *and upon such agreement and consent being delivered and in consideration thereof*, such bank and its shares of stock shall be exempt from all other taxation whatsoever, so long as said tax shall be paid, during the corporate existence of such bank."

Section 5 of this act provides: "The said banks may take the proceedings authorized by sec. 4 of this act, at any time, until the meeting of the next General Assembly: *Provided*, they pay the tax provided in sec. 1, from the passage of the act."

Section 6 provides: "This act shall be subject to the provision of sec. 8, chap. 68, General Statutes."

The banks involved in this litigation accepted in writing the provisions of the act and filed their written acceptance with the Governor under their corporate seals. The banks incorporated before the act of 1856 surrendered what they claimed to be their charter contracts, by which they were taxed only fifty cents on their shares of stock of one hundred dollars. The national banks yielded their right to deduct from the value of their stock their surplus consisting of non-taxable securities, and their claims to be taxed as the old banks, and most of the State banks uniting to prevent any discrimination, all accepting the proposition made by the State and agreeing to pay seventy-five cents on each share of stock of one hundred dollars in value, and the additional tax mentioned in the article.

It is conceded by counsel for the city of Louisville (and we think it clear) that prior to the passage of the Hewitt bill, in the year 1886, the Bank of Kentucky had an irrevocable contract to be taxed at the rate of fifty cents on each share of one hundred dollars, and the same may be said of all the banks chartered prior to the act of 1856; but it is

further contended that the act, as well as the contract under it, were both subject to repeal by reason of the reserved power contained in sec. 6 of art. 2. Again it is contended by counsel for the city of Frankfort that the grant to the banks was without any consideration, and the renewals of the charter of the old banks, as they are designated, placed them within the provisions of the act of 1856, and by the attorney-general that the State had no power to surrender this right of taxation, and the contract, if made, is not binding.

This court, in the case of the Franklin County Court v. Bank of Kentucky reported in 87 Ky., 370, in an opinion delivered by Chief Justice Bennett, held that the renewals of those charters did not affect the contract made with the State under the original grant, and if disposed to reconsider the decision rendered in that case, it could not affect the issue involved on the present appeals. At the date of the passage of the Hewitt bill the Franklin Circuit Court had decided that the charter contract still existed, and after the acceptance by the banks of the provisions of the Hewitt bill that court affirmed that judgment. It is apparent that art. 2 in the Hewitt bill was adopted by the legislature with a view of equalizing the burdens of taxation as between the banks and to relieve them from the burden of local taxation during their corporate existence, but it is insisted there was no consideration for this partial exemption.

If there was a binding contract between the *old banks* and the State to pay a tax of only fifty cents on each share of stock, and these banks surrendered their contract, or their right under it, and agreed to pay seventy-five cents to the State instead of forty-two and one-half cents, it seems to us this would be a wise consideration, sufficient to uphold any such contract with the State, if the power existed with

the State to make it, and the fact that such a power existed has been too often decided by this court, as well as the Supreme Court, to require authority in support of it. It is plain also that these banks, including the national banks, surrendered their rights, not only to settle the question as to local taxation, but to prevent competition or any discrimination between banks located in the commercial centers of the State and those outside of such localities, while no heavy burdens for local taxes were being levied, and therefore the consideration moving from the old banks was for the benefit of all the banks accepting the terms of the contract. The legislature was attempting to avoid all discrimination between these monied institutions and, therefore, its exactions from the old banks and the national banks being acceded to, it resulted to the benefit of the banks organized after as well as before the act of 1856, as to such banks uniting with the old banks in accepting the Hewitt bill. In this statute, imposing the tax of seventy-five cents and its acceptance on the conditions proposed, there exists every element of a contract between the State and the banks, and with such a consideration as will uphold it, no reasonable doubt can be entertained that such was the purpose of the parties to it.

It is contended that if a contract was entered into, the provisions of the present constitution, and subsequent legislation under it, operated to repeal not only the statute, but the contract made by virtue of its provisions, and this power existed by reason of the sixth section of the article, making it subject to the provisions of sec. 8, chap. 68, General Statutes, declaring that this "shall be subject to amendment or repeal at the will of the legislature, unless a contrary intent be plainly expressed: *Provided*, That whilst privileges and franchises so granted may be changed

or repealed, no amendment or repeal shall impair other rights previously vested."

Assuming, and as we think was the legislative intent, the word *act* in section 2 of the Hewitt bill was used as synonymous with the word *article*, and, therefore, the reservation of the power on the part of the legislature was the right to amend or repeal the article in which is contained the proposition by the State to the banks, in reference to taxation, it by no means follows that a contract made by virtue of its provisions can be abrogated at the will and pleasure of the legislature. The distinction between the power of the legislature to repeal an act, and the right to annul by repeal or otherwise a contract made under it, is manifest, and while under our present constitution the State can make no contract, by which the exercise of the taxing power can be lessened or any part of its sovereign power in that regard relinquished, under the former constitution property might not only be classified in imposing taxation, but the State could discriminate between the classes when providing the rate of taxation, and this doctrine has been recognized by numerous decisions of this court and sustained in like cases by numerous decisions of the Supreme Court.

The general rule in regard to legislation is, that one legislative body can not bind a subsequent legislature to its action in purely legislative matters, but when it comes to matters of contract, if the State has the power to make it, its terms and conditions are as obligatory on the State as if entered into between two of its citizens, and an attempt to cancel such a contract, without the consent of the party with whom it is made, is in direct violation of that clause of the Federal Constitution providing that "no State shall . . . pass any law impairing the obligation of contracts." (Sec. 10, art. 1, U. S. Const.)

That the State may enter into such contracts was held by this court as early as the year 1839, in the case of *Johnson v. Commonwealth*, reported in 7 Dana, 342, where there was an effort to tax the shares of stock in a bank, in excess of the terms of the contract, and this court held that the contract placed a limitation on the power.

In the case of the *Farmers' Bank v. Commonwealth*, reported in 6 Bush, 127, it was held the bank could not be taxed beyond its charter rate, as fixed by the contract, and in the late case of the *City of Frankfort v. The Bank of Kentucky*, and others, reported in 87 Ky., 370, the same doctrine was announced.

The question then arises: Did the reservation of the power to amend or repeal this article of the Hewitt law empower the legislature, or the framers of the constitution, to disregard this contract between the banks and the State? We are satisfied, after a careful consideration of this question, that the parties making it never contemplated or intended that the act of 1856 should apply to this contract after its acceptance by the banks, and that such an acceptance was necessary to make the contract complete between the parties. The legislature, at the time this contract was made, recognized the right of the Bank of Kentucky, and the banks chartered prior to 1856, to stand upon their charter rights, or if not the right of the banks as against the State on this subject of taxation had found its way to the courts, and had been decided adversely to the State. The legislature thought the tax of fifty cents too small. The old banks claimed an irrevocable contract. The national banks could only be taxed as authorized by the federal congress. The new State banks were subject to such taxation as the State might see proper to place upon them, and to make them liable for these local burdens would be

to end their existence, or cause them to seek shelter under the Federal banking act, and with a view of placing the entire matter at rest, and placing the banks on an equal footing, the legislature said to all of the banks: "If you will agree to pay seventy-five cents on each share of stock equal to one hundred dollars, etc., it shall be in full of all tax, State, county and municipal." It said to the old banks: "You must relinquish your right to a smaller rate of tax, and this must be done, not by your president and directors, but by the consent of the stockholders, in writing, and delivered to the Governor as evidence of your good faith." The banks accepted the proposition made them in the manner pointed out by the act, and from that time to the adoption of the present constitution, the contract was adhered to by both the State and the banks. It is now argued the banks, and particularly those with charter contracts for a smaller rate of taxation, surrendered those charter rights and agreed to pay a higher rate of tax under an act that authorized any subsequent legislature to repeal the contract at its will and pleasure. No rational view of this agreement should lead to the conclusion that business men at the head of these institutions would relinquish every right they had acquired under their charters, that an increased burden might be placed upon the banks they represented.

In the contention that the sixth section of the article reserves this power of repeal, counsel overlook the fact, that by the express terms of the section by which this reserved power is retained, it is provided that "*no amendment or repeal shall impair other rights previously vested.*" The execution of the agreement between the State and the banks, based on a consideration such as appears from the act itself connected with its acceptance by the banks, vested in the latter rights of which they could not be divested with-

out their consent, the chief of which was the payment of a specified tax to the State during their corporate existence.

The State waived its right to tax these banks for local purposes (except their realty), and required in lieu thereof an additional tax to be paid into the State treasury. In this way the State granting the franchise derived the benefit instead of the municipal government, while under the present system, the difference between forty-two and one-half cents and seventy-five cents, with tax on surplus amounting to one hundred and twenty-five thousand dollars, is taken from the revenue proper, and applied to the municipalities where the banks are located.

In the case of *Commissioners of Sinking Fund v. Green & Barren River Navigation Company*, reported in 79 Ky., 73, this court held, with the act of 1856 in full force, that the State had no power to annul a contract that had been executed between the State and the company, and that the repeal of the charter to the extent it deprives the company of its contract rights acquired under it was in violation of the constitution. In that case the court said: "We can not assent to the doctrine that will allow the State to alter or abolish such contracts, whenever, in the opinion of the legislature, the necessities of the public or the interest of the State require it."

The case of *The Commonwealth v. Owensboro, &c., R. Co.*, 95 Ky., 60, determines in effect the question involved here. In the year 1884 the legislature passed an act to encourage the construction of railroads, and in doing so relieved them from taxation for a limited period. The act provided: "That all railroads which may hereafter be built within this Commonwealth under existing charters, or under charters which may hereafter be granted, shall be exempt from all taxation under the laws of this Common-

wealth for the period of five years, from the date of the beginning of the construction of the new roads."

The State claimed the right under the act of 1856 to repeal the law, claiming this had been done by legislation, as in the case before us, and attempted to coerce payment of taxes, when the five years from the beginning of the construction of these roads had not expired.

The court, in response to the argument to exact the tax, and the application of the act of 1856 to its provisions, said: "It is sufficient to say of this proposition, which even at first blush strikes us as extraordinary and unjust, if attempted to be applied to those of the appellees who accepted the offer of the State, and expended their money on its exemption pledge, that the act of 1856, reserving the right to repeal or amend charter privileges granted by the legislature to particular persons, has no application to the law of 1884, which, as said before, was a general law and affected all alike who accepted its provisions or acted on the strength of them."

Counsel for the local governments argue the questions involved as if there was a perpetual grant to these corporations, and, therefore, the power of repeal must of necessity have been reserved. The limitation of the grant extends to the life of the corporate charter, and with the banks existing prior to the act of 1856 their charters expire in ten or twelve years, and hence the policy of the State, if viewed in that light, was wise, because it was increasing the State revenue from fifty to seventy-five cents for a fixed and certain period.

The framers of the constitution in adopting that instrument were not looking to past legislation on this particular subject, but were creating an original law for the future welfare of the State, leaving the rights of those protected

by either the State or Federal constitutions undisturbed, and if the attempt to repeal vested rights had been made, the framers of the present constitution would have been as powerless to accomplish such a purpose as the legislature in session after its adoption.

The Supreme Court decided a somewhat similar question on a writ of error to the Court of Appeals of New Jersey, in the case of *New Jersey v. Yard*, reported in 95 U. S., 110. By an act of the legislature, passed in March, 1865, the legislature of New Jersey enacted that the Morris & Essex Railroad Company should pay a tax of one-half of one per cent., to be paid by the company to the State whenever the net earnings of the company amount to seven per cent. on the cost of the road, to be paid at the expiration of one year from the time when the road shall be open, and in use to Philipsburg, and annually thereafter, *which tax shall be in lieu and satisfaction of all other taxation and imposition whatever, by or under the contracts of this State.*

The twentieth section of the original act of incorporation reserved to the legislature the right to alter, amend or repeal the act whenever it should think proper. The act of 1865 was an amendment to the original grant and in regulating the amount of taxation contained this proviso: "*Provided, That this section shall not go into effect, or be binding on the company, until the said company, by an instrument duly executed under its corporate seal, and filed in the office of the Secretary of State, shall have signified its assent thereto, which assent shall be signified within sixty days after the passage of this act, or this act shall be void.*"

Chief Justice Miller in delivering the opinion in that case said: "The main question here is, did the legislature intend to make such a contract," and held that "its meaning and its

terms are clear enough, and, taken alone, no one denies but that it is a contract which would be protected by the constitution of the United States." And in like manner will the contract in question be upheld.

And as said by Mr. Justice Miller in *New Jersey v. Yard*: "The legislature was not willing to rest this contract in the usual statutory form alone, depending on its validity as a contract upon some action of the corporation under it to bind it to its terms; but they required of the company a formal written acceptance within sixty days, else it became wholly inoperative." And it may be said in the *New Jersey* case there was no consideration other than is found in ordinary railroad charters.

It is said, however, in that case, the repealing clause, or what is known in this State as the act of 1856, was appended to the original charter, and when amended it formed no part of the amendment, as is found in this case, and, therefore, the court concluded the amendment was not subject to repeal.

The question is asked, why the necessity of making the act of 1856 apply to article 2, if the legislature did not intend to reserve the right of annulling the contract? In response to this it might be asked, if such was the legislative intent, why the necessity of having a formal written acceptance from the banks surrendering all their respective charter rights, and in consideration therefor agreeing to tax them seventy-five cents on the hundred dollars, so long as their charters continued, if the power was reserved of abrogating the contract at any moment. If such was the legislative purpose there could have been no necessity for any consideration moving from the banks, or any formality attending the execution of the contract.

The act of 1856 was enacted to avoid the effect of the de-

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cision of the Supreme Court in the Dartmouth College case, reported in 4 Wheat, 518, to enable the sovereign power to amend and repeal charter provisions that had theretofore been regarded as beyond the power of the legislature, without such a reservation, but under this act of 1856, it has been held by this court, as well as every other court having the question before it, that property rights or contract rights, acquired by virtue of the charter in exercising the privileges conferred, could not be interfered with by legislation, and, in fact, the act expressly provides "that whilst privileges and franchises so granted may be changed or repealed, no amendment or repeal shall impair other rights previously vested."

The old banks had contract rights sustained by the adjudications of the courts of the State that exempted them from local taxation, and the same adjudication was had in regard to national banks, although the cases as to the national banks were decided subsequent to the passage of the Hewitt bill. (*City National Bank of Paducah v. The City of Paducah*, 10 Ky. L. R., 221; *Covington City National Bank v. City of Covington*, 21 Fed. Rep., 484.)

The legislature saw the obstacle in the way of increasing the taxation on these banks, and the national banks, standing on the same footing with State banks, it became apparent that it was to the interest of the State to hold out inducements to all the banks, that equality as between them might exist, and at the same time increase the taxation. The banks had not asked for any amendments to their charters, nor was the effort made by the legislature to repeal or amend the charters. The State was attempting to enact a general law, entitled *Revenue and Taxation*, applying to all subjects of taxation, and to all kinds of property. The tax in regard to banks, under this general title, was fixed

at seventy-five cents as to all banks, *and as to all corporations*, required by law to be taxed on their capital stock, and as to the old banks and the national banks, the surrender of these rights was made to depend upon their acceptance of the proposition made to them by the State, by the terms of which they were to pay the tax imposed by the Hewitt bill, and be released from other taxation, so long as their charters continued.

Why, then, did the legislature annex to *article 2*, of the revenue bill, the provisions of the act of 1856? No contract had been made when the bill passed, as there had been no acceptance by the banks, and not until the adjournment of the legislature was the contract consummated. It was provided in *article 2* that the acceptance had to be made before the legislature again assembled, and the act of 1856 could only have authorized the reservation of power to repeal or withdraw this proposition, if, within the period fixed, there was no acceptance by any of the banks of its provisions.

The right to the franchise or the exercise of the privileges granted was not involved in the legislation, but the banks, with their charters in full force, were asked by the legislature to make an agreement as to a rate of taxation, that could not have otherwise been enforced against either the old banks or the national banks.

The corporations had the right to contract by reason of their charters, and, dealing at arm's length with the State, accepted the terms and conditions offered in good faith, and the question here is, not the right of the State to repeal or amend their charters, but the right of the State to cancel this contract without the consent of the banks."

The right of the State to repeal the franchise, or amend the charter, is not here questioned, when subject to the act

of 1856, but the repudiation of a contract will not be sanctioned.

There was, in fact, necessity for the State to apply the act of 1856 to article 2. Other corporations, as well as banks organized since 1856, were liable to this tax, whether they accepted the provisions of the Hewitt bill or not; and section 4 was inserted for the express purpose of creating a contract between the old banks and the national banks on the one side, and the State on the other, by which the taxation on these banks might be increased, and, at the same time, placing all the banks accepting its terms on the same footing. If no acceptance had been made there was no reason why the act could not have been enforced as against these corporations coming within the act of 1856, but neither the banks nor the State ever intended to perform such an idle act as entering into this solemn agreement that might be disregarded by the State whenever its representatives saw proper.

The rule is, if a statute is susceptible of two constructions, that which is consistent with public policy will be followed, and no meaning given a statute that will lead to an absurdity.

The case before us is much stronger for the banks than that of *New Jersey v. Yard*. Here, the old banks had contract rights sustained by the adjudication of the courts of the State, to the effect that they were not liable to local taxation, and the same adjudication followed in reference to national banks. The contract was not only executed, but based on a valuable consideration. If there were any doubt as to its meaning, that doubt would be construed for the State; but when considering the entire article, the intention of the legislature, it seems to us, is manifest. This increased tax, under the former constitution, as

before stated, went to the State, and not to the municipalities. Such was the policy of the State when the contract was made, and we perceive no reason for abrogating its terms, so as to withdraw from the State treasury this additional tax the banks have been paying amounting to \$125,000 annually, and transfer it to the cities to aid in discharging local burdens.

It requires no judicial utterance to show that, under the national banking act, where the rate of interest is fixed at six per cent. (or as the State law provides), and a forfeiture of the entire interest if more is charged, that these banks, by the imposition of local burdens, can not be taxed as much as two and one-half per cent. in any locality, when the average taxation of State banks will not exceed half that sum.

In the case of *Lionberger v. Rouse*, reported in 9 Wall., 468, after the national banking system went into effect, the legislature of Missouri passed a law authorizing the banks of issue in that State, ten in number, to enter into the new system. Eight of those banks became national banks, and two of them declined to do so. The two old banks, as the Supreme Court of the United States held in that case, had a contract right with the State not to be taxed exceeding one per cent., and the State was powerless to increase this tax. The assessment of the plaintiffs' shares of stock in the national bank was at the rate of nearly two per cent. It was contended that this was an unjust discrimination in favor of the two State banks, and the Supreme Court said, as the national bank, or its shares, was not taxed for a greater sum than other moneyed institutions of the State, and the State was powerless to change its contract with the two remaining banks of issue, it was not such a discrimination as would authorize the court to interfere.

While there are exceeding *sixty* State banks, the Bank of

Kentucky and its branches, the Northern Bank and its branches, the Bank of Louisville, and the Farmers Bank of Kentucky and its branches were, at the time of the passage of the Hewitt bill, and are now, regarded as the prominent banking institutions of the State, and if, with their capital and business rank placed before the Supreme Court with a tax of only one per cent., and the tax on the national banks placed at two per cent., the judgment of the Supreme Court upon such a state of fact, doubtless, would have been similar to the decision of the court in the case of the *National Bank v. The City of Paducah*, 10 Ky. L. R., 221.

The case of *Lionberger v. Rouse*, 9 Wall, 468, has no bearing on this question of contract. Here the State was not powerless to remedy the evil, or prevent the discrimination complained of in the Missouri case. The legislature devised a mode by which this discrimination could be removed, however great, or even insignificant, the difference in taxation might have been. The national banks recognizing the fact they could be taxed as other moneyed capital, and desiring uniformity of taxation, and not one rate for one bank, and a different rate for another, surrendered their right, or claim, to be taxed as the old banks were taxed, and entered into this agreement by which a uniform system of taxation was adopted for all banks, such as the State desired.

The claim of the old banks and the national banks, as to the mode of taxing them, was, certainly, not without foundation, for the reasons already given, and the proposition by the legislature to settle these differences, and its acceptance, was a wise and just solution of the whole question.

The case presented by this legislative repeal is the opposite of the legislation in the Missouri bank cases. In the one case there was no legislation making the discrimination, while in the case before us, the State, after placing

the banks, State and national, on the same footing as to taxation, by the consent and agreement of all the parties to the contract, is now insisting upon a legislative rescission of the contract, and placing the old banks at least in a position where they are to pay only fifty cents on the shares of a hundred dollars, and leaving the national banks subject to a greater rate of taxation.

This repeal, if sustained, is in effect the creation of three or more new banks with a rate of taxation much less than that imposed on the national banks, and making a discrimination in favor of the old banks and their branches that gives them a monopoly of the banking business of the State.

The old banks, with a capital of five millions, at the time the Hewitt bill passed, will be relegated to the condition they were when the contract was made, as was held by the Supreme Court in the case of *The Water Company v. Clark*, reported in 143 U. S., 1, and that is *an exemption* from local burdens, with a tax of one-half of one per cent. to the State. The national banks, with a capital of ten millions when the Hewitt bill was enacted, and now increased to twenty millions, will also be exempt from local burdens, because the State, in the exercise of the power it now claims, has abandoned the contract under which taxation was equal and uniform, and voluntarily made an unjust discrimination, when in its power to prevent it. Such consequences would be disastrous to both the State and the municipalities, the State losing the increased tax, and the municipalities (or the legislature for them) without power to impose on national banks local burdens.

The banks have all, practically, accepted the provisions of the Hewitt bill, and the legislation repealing or canceling the contract, being in violation of both the State and Federal constitutions, leaves the Hewitt bill, as to the banks,

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in full force, and they must be taxed under its provisions, until the contract terminates.

These moneyed institutions are now paying, including tax on surplus and realty, eighty cents, or about that sum, on each share of stock of one hundred dollars, while the citizen tax-payer is paying only forty-two and one-half cents, and at last it is a question whether this difference in the taxation is to be paid by the banks into the State treasury, as under the old constitution, or to the municipalities, under the new constitution.

In the absence of this contract it would go to discharge local burdens, but with this contract in full force, it must be paid, as to the amount and manner, as provided by the Hewitt bill of 1886, into the treasury of the State.

It results, therefore, that the judgments in the case of the Louisville Banking Co. v. City of Louisville, Third National Bank v. City of Louisville, Northern Bank of Kentucky v. Bourbon County, Deposit Bank v. Franklin County, Bank of Kentucky v. Armstrong, Bank of Kentucky v. City of Frankfort, Farmers Bank v. City of Frankfort, Same v. Franklin county, and Same v. City of Henderson are reversed; and the City of Louisville v. Bank of Kentucky, Commonwealth v. State National Bank, Same v. Frankfort National Bank, Same v. Deposit Bank, Same v. Bank of Kentucky, City of Covington v. German National Bank, Same v. First National Bank, and Commonwealth v. Farmers Bank are each and all affirmed.

JUDGE PAYNTER DISSENTING:

Were this a case simply affecting the rights of two citizens of the State, I might content myself with dissenting, without expressing my reasons therefor, but involving as it does the sovereignty of the people, and denying to them, as

I conceive it does, the right to have their will to assume the form of law, on such a vital question as that of taxation, and their right to demand and enforce equal and just taxation, I feel constrained to give my reasons for dissenting from the views expressed by the court.

The effect of the opinion of the court is to destroy a principle engrafted in the laws of this State nearly forty years ago. One so important that it was declared by the General Assembly to be in effect written in every act of incorporation granted by it. So important was the reservation of the right to amend or repeal all acts of incorporation that the General Assembly was unwilling to run the risk of inserting it in each act, but declared, by general law, that it should be understood to be written in all of them.

The opinion, in effect, denies the power of the people, through their organic law, to declare what are just principles of taxation, that the same rate of taxation shall be imposed on the property of corporations as on an individual, and the authority of the General Assembly to execute that constitutional mandate. I believe that corporate rights should be held as inviolate as those of the citizen; that each citizen should bear his full share of the common burden of taxation; "that all freemen, when they form a social compact, are equal; and no man or set of men are entitled to exclusive, separate public emoluments or privileges from the community, but in consideration of public services."

I do not believe in the State passing laws impairing the obligation of its contracts with corporations or individuals when the contracts are made by virtue of the provisions of the constitution. Nor do I believe in denying the right to the State to withdraw from a contract when, in express terms, the right to do so is reserved, as in such case it can not be said to impair the obligation of the contract.

While I regard there is a vast difference between granting a corporate franchise authorizing the acquisition of property, by donation and otherwise, for the purpose of educating and spreading the gospel among the Indians, and affording an opportunity to the youth of the land in the days of the early settlement of the country to obtain an education, as was the purpose of the charter to Dartmouth College, and granting immunity from taxation to institutions operated solely for private gain, yet, as the courts of the country, taking the principle enunciated in the Dartmouth College case as authority therefor, have held that immunity from taxation granted in the act of incorporation is a contract with the State, and is irrevocable, unless the right to revoke is reserved in the act of incorporation, or in a general act, which must be treated as part of the act of incorporation, in considering these cases I shall accept that as the rule to govern in the determination of the questions involved. Indeed, it is unnecessary to take any other view of the law in order to reach the conclusion which I have done in these cases. However, I can not forbear quoting what Justice Miller said in delivering the opinion of the court in *New Jersey v. Yard*, 95 U. S., 114, to-wit: "The writer of this opinion has always believed, and believes now, that one legislature of a State has no power to bargain away the right of any succeeding legislature to levy taxes in as full a manner as the constitution will permit. But, so long as the majority of this court adheres to the contrary doctrine, he must, when the question arises, join with the other judges in considering whether such a contract has been made."

I agree with Justice Miller that in the matter of taxation one legislature of a State has no power to bargain away the right of a succeeding legislature to levy taxes in as full a manner as the constitution will permit. Such a power could

be exercised to such an extent as to almost destroy the government, or to grievously burden one class of its citizens.

Instead of having the Dartmouth College case under consideration, had Chief Justice Marshall had a case coming from Kentucky, wherein it was claimed the legislature had sought to impair the obligation of a contract it had made with one of the old banks, by passing a statute providing it should pay an amount of tax in addition to that specified in its charter, I can not believe, in view of the constitutional provision prohibiting the granting of exclusive privileges except "in consideration of public services," he would have held the bank had an irrevocable contract with the State.

From the Dartmouth College case to the present time (and the right was in that case recognized), the Supreme Court of the United States has uniformly held that wherever the legislature granting the charter reserved the right to amend or repeal it, either by so providing in the charter or by a general law, the right to amend or repeal such charter exists, and to do so is not to impair the obligation of a contract, the charter being accepted with the full understanding that the right of repeal is part of the contract, and to the exercise of which right the grantee has consented.

Many of the States, after the Dartmouth College case, began to realize the importance of reserving the right to control corporate organizations, which, from time to time, were being created, and to make sure that such power was being reserved, they passed general laws expressly reserving such power, which statutes became a part of every act of incorporation as fully as if written therein, unless a different purpose was therein plainly expressed.

The legislature of this State, being fully aware of the importance of such action as would reserve the right to amend or repeal acts of incorporation, passed what is known as

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the statute of 1856, which is sec. 8, chap. 68, General Statutes.

It reads as follows: "All charters and grants of or to corporations, or amendments thereof, executed or granted since the 14th of February, 1856, *and all other statutes*, shall be subject to amendment or repeal, at the will of the legislature, unless a contrary intent be therein plainly expressed: *Provided*, That whilst privileges and franchises so granted may be changed or repealed, no amendment or repeal shall impair other rights previously vested."

It seems so plain that charters and grants, since the 14th of February, 1856, are subject to amendment or repeal at the will of the legislature, unless a contrary intent is plainly expressed therein, that it is needless to discuss it. The Supreme Court of the United States has not only so held, but this court has done likewise in every case that has been before it.

Acts of the character of the act of 1856 have uniformly been held to be a condition upon which every charter of a corporation subsequently granted was held, and upon which every amendment or modification was made, and that they were as much a part of the charters as if incorporated into them. Any other interpretation would render the statute inoperative, and wholly deprive it of its power to accomplish the purpose of its enactment.

In 1841 South Carolina passed a statute substantially the same as the statute of 1856. The Northwestern Railroad Company was incorporated in 1851. In 1855 an act was passed to amend its charter, the amendments exempting the railroad company from taxation. In 1868, the State adopted a new constitution in which it was declared that the property of the corporations then existing, or thereafter created, should be taxed. The legis-

lature of the State passed an act to enforce that provision of the constitution.

The question involved in *Tomlinson v. Jessup*, 15 Wall., 454, was as to the enforcement of such legislation. Justice Field, in delivering the opinion of the court in the case, said: "It is true that the charter of the company, when accepted by the corporators, constituted a contract between them and the State, and that the amendment, when accepted, formed a part of the contract from that date, and was of the same obligatory character. And it may be equally true, as stated by counsel, that the exemption from taxation added greatly to the value of the stock of the company, and induced the plaintiff to purchase the shares held by him. But these considerations can not be allowed any weight in determining the validity of the subsequent taxation. The power reserved to the State by the law of 1841 authorized any change in the contract as it originally existed, or as subsequently modified, or its entire revocation. The original corporators or subsequent stockholders took their interests with knowledge of the existence of this power, and of the probability of its exercise at any time, in the discretion of the legislature. The object of the reservation, and of similar reservations in other charters, is to prevent a grant of corporate rights and privileges in a form which will preclude legislative interference with their exercise, if the public interest should, at any time, require such interference. It is a provision intended to preserve to the State control over its contracts with corporators, which, without that provision, would be irrevocable, and protected from any measures affecting its obligation. There is no subject over which it is of greater moment for the State to preserve its power than that of taxation. Immunity from taxation, constituting in these cases a part of the contract with the govern-

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ment, is, by the reservation of power such as is contained in the law of 1841, subject to be revoked equally with any other provision of the charter whenever the legislature may deem it expedient for the public interests that the revocation shall be made. The reservation affects the entire relation between the State and the corporation, and places under legislative control all rights, privileges and immunities derived by its charter directly from the State."

The same doctrine is enunciated in *Railroad Co. v. Maine*, 96 U. S., 499; *Railroad Co. v. Georgia*, 98 U. S., 359; *Hoge v. Railroad Co.*, 99 U. S., 348; *Greenwood v. Freight Co.*, 105 U. S., 13, 21; *Spring Valley Water Works Co. v. Schottler*, 110 U. S., 347-352; *Close v. Greenwood Cemetery Co.*, 107 U. S., 466-476; *Louisville Gas Co. v. Citizens Gas Co.*, 115 U. S., 683-696; *Gibbs v. Consolidated Gas Co.*, 130 U. S., 369-408; *Sioux City Street Railway v. Sioux City*, 138 U. S., 98-108.

It must be conceded from the authorities cited, the Supreme Court of the United States has repeatedly held that the legislatures of the States have the power when reserved in the charter or by general law to change or repeal acts granting corporate privileges or franchises. The decisions of this court are in accord with these opinions.

The case of *Griffin v. Kentucky Insurance Company*, 3 Bush, 592, has been quoted, with approval, in the case of *Louisville Water Co. v. Clark*, 143 U. S., 14, and in that case the court held that in all cases of charters or grants of corporate franchises when the intention of the legislature was not "plainly expressed," not to exercise the power reserved by the statute of 1856 to amend or repeal at the will of the legislature, such charters or grants must be read as if all the provisions of the act of 1856 were incorporated in them.

Judge Robertson, in delivering the opinion in *Griffin v. Kentucky Insurance Co.*, 3 Bush 595, said: "Then was this general reservation of power, like a special reservation in the charter itself, a part of the contract; or was the contract made subject to it, and the obligation defined or modified by it? We think so. And whatever might be thought of the policy of such legislation, or of the policy or justice of the repealing statute, over which the judiciary has no jurisdiction, our conclusion, as to the mere power of repeal, is, as we think, sustained by reason and abundant authority.

"All contracts, except such as are municipal, are made subject to law, and their obligation is defined by the *lex loci contractus*. Why should the contract in this case be excepted? Such exception would be unreasonable; and the authorities fortify the reason."

In the case of *Cumberland & Ohio Railroad Co. v. Barren County Court*, 10 Bush, 604, in reference to the act of 1856, the court said: "The act was intended to preserve to the State control over all acts of incorporation thereafter passed. Experience had demonstrated the propriety of, if not the absolute necessity for, such a reservation of power, and it would be a manifest disregard of the clearly expressed will of the legislature for the courts to resort to technical rules of construction, or finely drawn legal implications, to escape the effect of the plain declaration that all charters of and grants to corporations shall be subject to amendment and repeal 'unless a contrary intent be plainly expressed.'"

I conclude that the legislature, in 1886, when it passed the revenue bill, had the right to amend or repeal at will all charters and grants of or to corporations or amendments thereof, enacted or granted since the 14th of February, 1856, "unless a contrary intent was plainly expressed."

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In view of decisions of the courts I also concede that as to the charters of banks granted prior to the 14th of February, 1856, unless the acts extending them reserved the right to amend and repeal their charters, any act of the legislature increasing their tax would be invalid as to such banks unless in the acts extending them the right to amend or repeal was reserved.

The national banks were subject to have the same tax imposed on their shares of stock as are imposed on State banks, doing business under charters granted since the 14th of February, 1856. Their real estate is subject to taxation. Their shares of stock may be taxed at their *actual* value, but no greater rate of taxation shall be collected on them than is assessed upon the moneyed capital in the hands of individual citizens of the State.

In the case of the Covington City National Bank v. City of Covington, &c., 21 Fed. Rep., 491, Justice Matthews, discussing this subject, said: "When, therefore, a State statute taxes the shares of a stockholder at their actual or market or full value, that, necessarily, includes such value beyond its par or nominal value as is imparted to the stock by the fact that the bank has a surplus fund or undivided profits. The interest which congress has left subject to taxation by the States under the limitations prescribed, and which is a distinct, independent interest in property held by the shareholder, like any other property that may belong to him, is that interest as defined in *Van Allen v. The Assessors*, 3 Wall., 573, which 'entitles him to participate in the net profits earned by the bank in the employment of its capital, during the existence of its charter, in proportion to the number of its shares, and upon its dissolution or termination to his proportion of the property that may remain of the corporation after the payment of its debts;' and

(p. 587) it includes for taxation the whole interest of the shareholder, such as would pass to the purchaser of the shares on a transfer of his certificate. So, when a State law taxes shares of national bank stock, it takes the same interest of the shareholder that he would transfer on a sale. The State may tax them at their actual or at their market value, or at any other rate of appraisement which does not violate the act of congress."

To the same effect are the cases of *People v. Commissioners of Taxes*, 94 U. S., 415; *Mercantile Bank v. New York*, 121 U. S., 138.

In the latter case the court said (p. 155): "The main purpose, therefore, of congress in fixing limits to State taxation on investments in the shares of national banks, was to render it impossible for the State, in levying such a tax, to create and foster an unequal and unfriendly competition by favoring institutions or individuals carrying on a similar business and operations and investments of a like character. The language of the act of congress is to be read in the light of this policy."

The legislature of Pennsylvania passed a statute taxing the shares in national banks on an assessed value thereof for *county, school, municipal, and local purposes*.

The Supreme Court, in *Hepburn v. School Directors*, 23 Wall., 480, held the statute valid. It has been decided that it is competent for the State to tax the shares of national bank stock, notwithstanding the capital of the bank was invested in bonds of the United States, which were not subject to taxation.

It is no discrimination against them, because they are required to pay a greater tax on their shares of stock than is paid by banks enjoying special privileges under their charters. (*Lionberger v. Rouse*, 9 Wall., 468).

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The court should endeavor to ascertain the legislative intent in the act of 1886, with reference to the taxation of banks, as all depends in this controversy upon what was that intent.

To aid in reaching a conclusion as to what the intent was, it is well to recall some official facts within the knowledge of the members of the legislature.

The first of July, 1885, was the date of the last report of the capital stocks of the banks in the State, before the enactment of the revenue law of 1886.

From that it is learned that the capital stock of the fifty-nine national banks amounted to\$9,708,900 00

The capital stock of the sixty-five State banks doing business under charters granted subsequent to 1856 amounted to.....\$6,224,891 00

The capital stock of the four State banks: Farmers' Bank of Kentucky, Bank of Kentucky, Northern Bank and the Bank of Louisville, incorporated prior to 1856, was.....\$5,144,500 00

It will be seen from this statement that the capital stock of the national banks, and the State banks chartered since 1856, amounted, in round numbers, to \$16,000,000.00, while the capital stock of banks whose charters ante-date 1856, amounted to about 5,000,000.00, being less than one-third of that of the other banks named.

It must be presumed that the legislature knew that the banks claiming irrevocable contracts to pay only fifty cents on each share of their capital stock equal to one hundred dollars, paid less than one-third of the revenue coming from the banks under the then existing law. It can hardly be said that the Farmers' Bank of Kentucky was in a condition to claim an irrevocable contract, because the act ex-

tending its charter, which became a law on March 10. 1876, expressly reserved the right to amend or repeal its charter and amendments thereto. It reads as follows: "That the charter of the Farmers' Bank of Kentucky, as amended, be extended for a period of twenty-five years from the termination of its charter as therein fixed:

"Provided, That said charter and amendments shall be subject to amendment or repeal by the General Assembly, either by general or special act. And provided further, That while the privileges and franchises so granted may be changed or repealed, no amendment or repeal shall impair other rights previously vested."

To simply quote the act extending the charter is a sufficient denial of and answer to the claim of an irrevocable contract. This left but three banks in the State which could claim an irrevocable contract, and one hundred and twenty-five without any claim whatever to immunity against increased taxation.

The revenue act repealed several acts by particularly naming them and excluded certain other acts from the repealing clause, and declared all other acts, general and special, and parts of acts inconsistent or not in conformity therewith, were thereby repealed. The revenue act is now chapter 92, General Statutes.

The only part of the act relating to the taxation of banks and other institutions of loan or discount is article 2, chapter 92, General Statutes. Section 1 of the article relates to the amount of tax which the banks shall pay and designates the method of levying the tax. Section 2 imposes certain duties on the cashier of the bank with reference to making a report to the auditor of public accounts. Sec. 3 exempts banks having certain money invested in bonds or funds of

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the United States from taxation named in the section. Sections 4, 5, and 6 of article 2, are as follows:

§ 4. "That each of said banks, institutions and corporations, by its proper corporate authority, with the consent of a majority in interest of a quorum of its stockholders, at a regular or called meeting thereof, may give its consent to the levying of said tax, and agree to pay the same as herein provided, and waive and release all right under the acts of congress or under the charters of the State banks, to a different mode or smaller rate of taxation, which consent or agreement, to and with the State of Kentucky, shall be evidenced by writing under the seal of such bank and delivered to the Governor of this Commonwealth; and upon such agreement and consent being delivered, and in consideration thereof, such bank and its shares of stock shall be exempt from all other taxation whatever, so long as said tax shall be paid during the corporate existence of such bank."

"§ 5. The said banks may take the proceeding authorized by sec. 4 of this act, at any time until the meeting of the next General Assembly: *Provided*. They pay the tax provided in sec. 1, from the passage of this act.

§ 6. *This act shall be subject to the provisions of section eight (8), chapter sixty-eight (68), of the General Statutes.*"

Section 7 provides that if the banks fail or refuse to make the consent and agreement as provided in section 4, then they are to be assessed and the same tax. State, county and municipal, shall be imposed, levied and collected, etc., as is imposed on the assessed taxable property in the hands of individuals.

Without section 4, the remaining sections of the article would have been a complete system for levying and collecting taxes on the banks chartered after 1856. *The article treats of nothing except the taxation of banks.*

It seems there can be no question of the power of the legislature, at that time, to impose a tax on such banks for State, county and municipal purposes. It was wholly useless for the legislature to ask the assent of the banks chartered since 1856 to make any consent to the imposition of tax on them for that purpose. The national banks are subject to the payment of taxes for State, county and municipal purposes, and it was not necessary to obtain their consent that they might be taxed for that purpose.

It was needless to ask this class of banks to enter into the agreement. The legislature may have entertained some doubt, not as to the right to tax national banks for State, county, and municipal purposes, but as to the method prescribed, and desired to remove all doubt by obtaining the consent of such banks to that method.

It was greatly to the interest of the national banks and the State banks, chartered subsequent to 1856, to enter into the agreement, because they were thus released from the payment of county and municipal taxes. In agreeing to pay the amount provided in the article for State purposes, they were released from local burdens, which in some instances are two or three times as great as that which they agreed to pay the State. It was greatly to their interest to accept the proposition of the State.

As a matter of fact, these banks were relinquishing no rights. They were, apparently, yielding a right which the State, in its sovereignty, already possessed. The right had never been relinquished, but had been expressly reserved. So vigilant had been the State to retain the control of corporations and retain its power to tax them, its purpose to do so was declared in the form of a legislative enactment, which was understood to be written in every act of incorporation.

It may be a more difficult task to show why the three old banks entered into the agreement. Their right to the immunity from increased taxation was questioned, as shown by the revenue act, as their charters were declared repealed, so far as they were inconsistent therewith.

It was the evident purpose of the legislature to induce these banks to recede from their claim to an irrevocable contract. It was desired that all banks should be placed upon the same footing in the matter of taxation with the other banks of the State. The legislature had been renewing their charters, and if they were again renewed, an appeal must be made to the same power. These banks may have realized that the act of 1856 should have, by a proper interpretation, been made applicable to the acts renewing their charters. However, it is needless to speculate further as to the reasons which induced them to enter into the contract with the State by which they released any irrevocable contract which they had under their charters, against increased taxation.

These banks had the right to give their consent to the increased taxation. The courts have always recognized the right of a corporation to consent to legislation or accept its provisions and be bound thereby, though it may have the effect of depriving such corporation of a vested right.

This brings me to the question as to what were the terms and conditions of the contract into which all these banks entered. The banks must be presumed to know the law and the effect of the contract to which they agreed. Those who represent banks are among the brightest and most sagacious business men of the country.

The contract is brief, simple and without ambiguity. In short, the State agreed to accept and the banks agreed to pay seventy-five cents annually, on each share of their stock

equal to one hundred dollars, and in consideration thereof be exempt from all other taxation whatsoever, so long as the tax shall be paid during the corporate existence of such banks.

If these were all the terms of the contract then it might be contended with some reason that it was irrevocable during their corporate existence. Being mindful of the policy which had been pursued for thirty years, it said in effect to the banks, it is desired that the contract be signed in the formal way prescribed, but it must be understood that the right to alter, change or abandon the contract is reserved to the State. That its purpose might be fully understood, the legislature placed in the article section 6, which, in terms, makes the statute of 1856 a part of the contract. It is expressly provided that the article shall be subject to the provisions of sec. 8, chap. 68, Gen. Stats.

The legislature was determined that the provisions of the act of 1856 should not depend on rules of construction to be read into the contracts by modification, but in terms said that it should be part thereof. It is admitted that when the word "act" appears in article 2, it has reference to the article (2).

Article 2 was an independent measure, offered as a substitute to article 2 of the original bill. The substitute was adopted, and became a part of the revenue bill. It now appears as part of the bill in the exact language as offered.

This section 6 has no reference to any part of the revenue bill, *except the article of which it is a part.*

It has been suggested that it had reference to new banks that might be organized. This could not be so because article 2 is dealing with banks in existence, and asks them to give their consent, etc. thereto, and says if at *all, they*

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must do so before meeting of the next General Assembly. When it is admitted that the word "act," as used, is synonymous with "article," then it must be admitted that the provisions of section 6, of article 2, are applicable alone to the article (2) of which it is a part.

If there could be any doubt, from the language used, as to the meaning of the legislature, then that must be removed by an examination of the House and Senate Journals. An amendment (p. 1241, House Journal, 1886) was offered to article 2, of the original revenue bill, and section 7 of that amendment read as follows: "This act shall *not* be subject to the provisions of sec. 8, chap. 68, of the General Statutes."

The amendment (p. 1243, House Journal, 1886) was defeated.

While the revenue bill was pending in the Senate, it was proposed to amend section 6, of article 2, by inserting after the word "shall," in the first line, the words "*not for ten years.*" (P. 1315, Senate Journal, 1886.) This amendment was defeated. Had it been adopted, then the section would have read: "This act shall *not for ten years* be subject to the provisions of section eight (8), chapter sixty-eight (68), of the General Statutes."

The proceedings of the House and Senate show the legislature fully understood the purpose for which this section was made part of article 2. It was the purpose of the legislature not to be restricted for any period of time in its right to repeal the article and withdraw from the contract.

In view of the plain provisions of the statute about the meaning of which there should be no doubt, and the intent of the legislature being fully explained by its records, it seems to me there should be no hesitation in concluding

the act of 1856 should be read as part of the contracts; hence, they are not irrevocable.

The fact that a written consent was asked and secured does not alter the application of the act of 1856. To this effect is *New Jersey v. Yard*, 95 U. S., 104. The facts of that case were as follows:

The Morris & Essex Railroad Company was created a corporation by an act of the legislature of New Jersey, passed January 29, 1835. The act provided that as soon as the net proceeds of the railroad amounted to 7 per cent. on its cost, it should pay a State tax of one-half of 1 per cent. on the cost of the road, and no other tax should be levied upon it.

The twentieth section reserved to the legislature the right to amend or repeal the act whenever it should think proper. A supplemental act was passed on March 2, 1836, in which the right to repeal or amend was reserved.

On the 14th of February, 1846, the legislature of New Jersey passed an act in effect the same as the Kentucky act of 1856. Another supplemental act to the charter of the railroad was approved March 23, 1865, authorizing a branch road to be built, and by which the company was vested with all the powers and franchises given by original and supplemental acts, etc.

The third section of the last named act reads as follows:

"Be it enacted, that the tax of one-half of one per cent. provided by this said original act of incorporation, to be paid by the said company to the State, whenever the net earnings of the said company amount to seven per cent. upon the cost of the road, shall be paid at the expiration of one year from the time when the road of the said company shall be open and in use to Phillipsburg, and annually thereafter, which tax shall be in lieu and satisfaction of all

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other taxation or imposition whatever, by or under the authority of this State, or any law thereof: *Provided, That* this section shall not go into effect or be binding upon the said company, until the said company, by an instrument, duly executed under its corporate seal, and filed in the office of the Secretary of State, shall have signified its assent thereto, and which assent shall be signed within sixty days after the passage of the act, or this act is void."

The instrument required by this act was duly executed by the company.

In the act of 1865 there was no reservation of the right to repeal or amend it.

Acts of the legislature imposed a more burdensome tax on the railroad company than that provided for in sec. 3, *supra*.

The sole question in *New Jersey v. Yard* was whether the act of 1865 and its acceptance by the railroad company constituted a contract, which could not be impaired by any subsequent legislature of the State. The court held that it was an irrevocable contract, *because the legislature had not reserved the right to amend or change it.*

It is plain from the opinion that had the legislature reserved the right to alter or change the contract or act by which it was made, the court would have held the act of the legislature doing so did not impair the obligation of the contract. Justice Miller, in delivering the opinion said:

"But as we have already said, since the legislature, which passed the act of 1865 had the power to make a contract which *should not be subject to repeal or modification* by one of the parties to it, without the consent of the other, the main question here is: *Did they intend to make such a contract?*

* * * * *

"In the case now under consideration, it is conceded on

all hands that the act of 1865 was a contract for a tax of one-half of one per cent. per annum on the cost of the Morris & Essex Railroad and no more. But counsel for defendant says the contract was repealable; that the legislature of its own volition could impose other and more burdensome taxes at its discretion; that it was a contract so long as the legislature of New Jersey was satisfied with it and no longer. It is conceded, also, that this construction of it can not be sustained, unless we are bound to import into it either the reservation clause of the act of 1836, or what is called the interpretation act of 1846. We have already shown how little reason there is for doing this on general principles of construction. We think it still clearer that it can not be done, because it is inconsistent with the legislative intent in passing the act of 1865.

* * * * *

"The implication is of a right to revoke it, and comes from the other quarter, and is one which *we do not think exists by fair construction, and which we do not feel at liberty to import into the contract to defeat its manifest purpose.*"

From the language of this opinion and the long line of decisions of the same court, it is manifest that the decision was made to turn on the question of the reservation of the right to amend or repeal, etc.

In order to hold that the right to alter, etc., the contract made under article 2. does not exist, it is absolutely necessary to eliminate section 6 from the article. No such a rule for the interpretation of statutes can be found, as the meaning of the section is manifest and clear.

Besides, by the very terms of the act of 1856, a rule of interpretation is given that "all charters and grants of or to corporations or amendments thereof *and all other statutes.*" shall be subject to amendment or repeal at the will

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of the legislature, unless a contrary intent be therein "plainly expressed."

It is proposed now by those representing the banks to disregard this statutory rule of construction. It is now in effect insisted that in order to reserve the right claimed, it must be "plainly expressed" in the act that it is reserved. This being done, it is still disregarded. The legislature, doubtless anticipating such contention and versatility, "plainly expressed" in the article that whatever was done thereunder or in pursuance thereof could only continue during its will. If section 6 was not for this purpose, I should like to have the court to suggest some reason as to why it was placed in the article. The doctrine is that where it is asserted that a state has bargained away her right of taxation in a given case, the contract must be clear and can not be made out by dubious implication. (*New Jersey v. Yard, supra.*)

The taxing power of the State is never presumed to be relinquished unless the intention to relinquish is expressed in clear and unambiguous terms. (*Bradley v. McAtee*, 7 Bush, 667.)

It is a familiar rule of construction of statutes that effect must be given to every provision except in cases of absolute and irreconcilable incongruity. (*Dazey v. Killam*, 1 Duv., 407.)

If one statute refers to another for the power given by the former, the statute referred to is to be considered incorporated in the one making the reference. (*Nunes v. Wellisch*, 12 Bush, 365.)

Mr. Cooley, in his work on Taxation (p. 204), says: "As taxation is the rule and exemption the exception, the intention to make an exception ought to be expressed in clear and unambiguous terms, and it can not be taken to have been

intended when the language of the statute, on which it depends, is doubtful or uncertain."

For the interpretation of statutes this court in *Nichols v. Wells, Sneed*, 259, said that "the most natural and genuine way of construing a statute is to construe one part by another part of the same statute; that the words and meaning of one part of a statute do frequently lead to the sense of another, and if it can be prevented, no *clause* or *sentence* or *word* shall be superfluous, void or insignificant."

As there is a clear expression of the legislative intent in the statute, no rules are really necessary to aid in its interpretation.

If A should rent B his farm for a term of ninety-nine years in consideration of a certain annual rental, but it was written in the contract that it was "subject" to be annulled at the will of A, in the interpretation of this contract would not a court hold that the entire instrument was to be considered in determining its effect? Would not A's right to annul the contract be just as enforceable as B's right was to enter upon the farm under the contract?

Whilst it might be said it was an unwise contract on the part of B, yet being capable of contracting he would be bound thereby, and a court would certainly not hold, because it appeared to be an unwise contract for B to have entered into, that therefore A did not reserve the right to annul the contract. This is the character of interpretation which must be employed to sustain the contention of counsel for the old banks.

It can hardly be said it was an unwise contract on the part of one hundred and twenty-five of the one hundred and twenty-eight in the State, as by the very terms of the act, under which the contract was entered into, they were re-

quired to pay State, county and municipal taxes, with the power in the legislature to increase it at will.

It certainly was a very advantageous contract for them to enter into. When these banks paid more than two-thirds of the taxes paid by all banks with the power in the legislature to increase the amount if they should so desire, what reason can be suggested as to why the legislature would desire to reverse the policy which had been steadfastly adhered to for so long, and enter into an irrevocable contract with such banks? Why should it want to surrender a power which it had been so zealous to preserve?

The contract was made subject to the right of the legislature to withdraw from it whenever it regarded the public interests demanded it should do so.

Whenever the banks accepted the provisions of the act of 1886, they surrendered any rights to immunity from increased taxation which their charter gave them.

The acceptance of the act of 1886 was a consent to the repeal of so much of their charters as were inconsistent therewith, hence they stood in such relation to the State as to future taxation as the legislature saw proper to impose.

If the provisions of their charters relating to taxation were repealed, as it must be admitted they were by the act of 1886, then such provisions were no longer in force. It is unreasonable to say that the provisions of the charters fixing the rate of taxation in the banks at fifty cents on each share of the capital stock of the banks equal to one hundred dollars can be in force, if the act of 1886, fixing such tax at seventy-five cents instead of fifty on shares, is in force. The court admits the latter is in force. In doing this it must be admitted the charter privilege has been repealed.

If repealed then by the act of 1886, surely the only way

in which the provisions of this charter could be restored would be by the legislature so providing in said act. There is no pretense this has been done. The fact that the law of 1886 has been repealed does not restore the former provisions of their charters.

Sec. 464, Kentucky Statutes, provides: "When a law which may have repealed another shall be repealed, the previous law shall not be *revived*, unless the law repealing it be passed during the same session of the General Assembly."

It is a most groundless contention to say that if the present law is sustained the old banks will be restored to the former privileges under their charters.

It has been suggested that the provisions of their charters with reference to taxation were vested rights, and, although they consented to the legislation of 1886, and became subject to the provisions of the act of 1856, still, as the charter privilege as to taxation was a vested right, therefore it was saved to them by the proviso which preserves "other rights previously vested." The purpose of the act of 1856 was to reserve in the legislature the power to destroy the privileges and franchises granted in the charters.

If it does not have this effect, it would be entirely inoperative, and the effort to retain control of corporations would be abortive. The claim that the privileges granted by art. 2 can be repealed, but without the right to terminate the contract with the banks, is not founded in reason.

The only privilege which the banks enjoyed was to pay the seventy-five cents on each share of stock in lieu of all other taxes.

To say that the law granting the privilege can be repealed because the right to do so was reserved, as is admitted by

this court, and still leave the banks in its enjoyment (*as is the effect of the opinion of this court*), is to employ logic that has never been in common use by this or any other court. This logic gives the banks the substance and the State the shadow.

The preserved rights then are not privileges and franchises granted by the repealed charter, but "other rights" which had vested previous to the act amending or repealing the charter.

The other rights are such as the beneficiaries under the charter may have acquired, in property, choses in action, real and personal property, or interests of every character which they could acquire in operating under the charter, and also such rights or interests as other persons may have previously acquired by contract, mortgage, judgment or otherwise, in the property belonging to the corporation.

My contention has been recognized as correct in all the decisions of this court, in passing upon the act of 1856. The Supreme Court of the United States has so construed the act. It was said in *Griffin v. Kentucky Insurance Co.*, 3 Bush, 594: "The proviso was intended to secure the rights of beneficiaries and others vested under the charter before its amendment or repeal, and does not affect the mere power to repeal the franchise." To the same effect is *Cumberland & Ohio Railroad Co. v. Barren County Court*, 10 Bush, 609.

Section 174 of the constitution recognized a just principle when it declared that all property, whether owned by persons or corporations, should be taxed in proportion to its value, unless exempted thereby, and that all corporate property should pay the same rate of taxation paid by individual property.

The legislature, in obedience to that provision of the con-

stitution, enacted the law for levying and collecting the tax from the banks of the State the validity of which is in question in these cases. For the reason already given, I conclude that the obligation of no contract was impaired by the action of the constitutional convention or the succeeding legislature. Some of the best lawyers in the State were members of the convention which framed our constitution, who gave an earnest consideration to the question involved in these cases, and their conclusions which they reached were crystallized in section 174 of the constitution. I believe that their conclusions are correct.

The opinion of the court denies the power is in the legislature to say what taxes the banks of the State shall pay for State purposes during the existence of their several charters. It denies the right of the legislature to compel them to bear any of the burdens of county and municipal governments. I can not believe the legislature did, or intended, by art. 2, of the act of 1886, to reverse its policy so earnestly pursued for a generation, and surrender to sixty odd banks of the State its right previously reserved to control them in the matter of taxation and to give up its power to increase or diminish the taxes imposed on one hundred and twenty-five banks, this including the national banks.

Exigencies may arise requiring the levying and collecting of vast sums to meet the public demand, yet, however great the emergency may be or imperative the demand for money to meet such wants, the legislature is powerless to compel the banks to contribute more than they are now paying at any time during their corporate existence.

The counties and municipalities are annually compelled to raise large sums of money by taxation. The counties of the State are compelled to incur large expenses to sup-

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port the county governments, to pay for bridges and public highways and to support their unfortunate citizens. The municipalities must incur great expense in making all necessary improvements for the comfort, safety and health of their citizens, to supply water and lights and to give police protection to their citizens and to the banks, yet the court concludes that the legislature has no power to compel the banks to contribute their fair share of such expenses.

In this view I can not concur.

Judges Lewis and Guffy concur in this dissenting opinion.

CASE 90—PETITION ORDINARY—JUNE 1.

Speagle v. Dwelling House Insurance
Company.

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103 373

APPEAL FROM FAYETTE COURT OF COMMON PLEAS.

1. THE FACT THAT TWO OF SEVERAL INSURED HOUSES WERE VACANT WHEN DESTROYED BY FIRE does not impair the right of plaintiff to recover on account of the other houses so destroyed, which were embraced in the same policy, each house being insured for a specific amount.
2. FIRE INSURANCE POLICY NOT RENDERED VOID BY CREATION OF MECHANICS' LIEN.—As the policy recited that the insured houses were then under way of construction, and privilege was given the insured to complete them, a provision in the policy that it should be void if the property should be "incumbered by mortgage or otherwise," or "if foreclosure proceedings shall be commenced," could not have been intended to apply to the creation or enforcement of the statutory lien of a lumberman and builders, and the fact that the lumberman and builders have taken the necessary steps to perfect the lien given them by the statute does not affect the right of the insured to recover on the policy.
3. SAME—FORECLOSURE PROCEEDINGS can not be had under our system of practice, and manifestly the provision that the policy shall become void "if foreclosure proceedings shall be commenced" was not intended to apply to enforcement of a statutory lien like the one in question here.

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S. E. HILL FOR APPELLANT.

1. The temporary vacancy of two of the houses did not render the policy void.
2. The mechanics' or lumbermens' lien did not constitute such a change of title or such an encumbrance as invalidates the policy. (Phoenix Ins. Co. v. Lawrence, 4 Met., 15.)

THOMAS H. HINES OF COUNSEL ON SAME SIDE.

BRECKINRIDGE & SHELBY FOR APPELLEE.

1. There was an actual vacancy of the two houses within the meaning of the policy at the time of the fire, one of them having been empty and unoccupied for two weeks and the other for eight days. (Note to Moore v. Phoenix Ins. Co., 10 Am. St. Rep., 390; Cont. Ins. Co. v. Kyle, 19 Am. St. Rep., 77; Aetna Ins. Co. v. Burns, Ms. Op., Nov. 13, 1894.)

The contract of insurance was indivisible. The policy provides in distinct terms for its avoidance if *either* of the buildings should become vacant or unoccupied. (Kimball v. Ins. Co., 8 Gray, 38; Lee v. Ins. Co., 3 Gray, 583; Springfield F. & M. Ins. Co. v. Phillips, 16 Ky. Law Rep., 352.)

2. The policy clearly provided against the encumbrance of the property by such a lien as is alleged, the words being *free from all liens whatever*. Even if the company knew that a lien would exist on the part of the contractor this knowledge on its part would not affect the plain stipulation of the policy against its creation. (Aetna Ins. Co. v. Burns, MS. Op., Nov. 13, 1874.)

Citations in petition for rehearing:

As to entirety of contract: May on Insurance, sec. 277; Fire Association v. Williamson, 26 Pa. St., 196; Gottman v. Penn. Ins. Co., 56 Pa. St., 210; Bowman v. Franklin F. Ins. Co., 41 Md., 620; Lovejoy v. Augusta Mut. Ins. Co., 45 Me., 472; Gould v. York County Mut. F. Ins. Co., 47 Me., 403; Barnes v. Mut. F. Ins. Co., 51 Me., 110; Schumitsch v. Am. Ins. Co., 48 Wis., 26; Hinman v. Hartford Ins. Co., 36 Wis., 159.

As to effect of mechanics' lien: Columbia Ins. Co. v. Lawrence, 2 Pet., 47; note to Byers v. Farmers' Ins. Co., 35 Am. Rep., 629.

JUDGE LEWIS DELIVERED THE OPINION OF THE COURT.

Ella C. Speagle brought this action against Dwelling House Insurance Company to recover \$1,000, on account of

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destruction by fire September 5, 1887, of four of nine dwelling houses, for which, April 30, 1887, it issued to her a policy of insurance amounting to \$2,250, being, as stated, \$250 on each.

Two defenses are pleaded: 1. That after the policy was issued two of the dwelling houses insured and destroyed became, and were, when the fire occurred, vacant and unoccupied; whereby, as provided in the contract, the policy was rendered void. 2. That June 11, 1887, William Tarr and T. J. Megibben filed in office of the clerk of Fayette County Court, wherein the property is situated, a statement provided for in such case, whereby a lien on the property insured was created in their favor for the sum of \$2,025, being, as recited, amount due for furnishing lumber and constructing said houses at her instance. The statement referred to was not made part of the answer, but agreed to be taken and considered as part of the reply for purpose of trying demurrer thereto, and appears to embody all facts required by statute to be stated in order to create such lien. The paper, however, does not purport to be an authenticated copy of the required statement, nor does it officially appear such statement was ever, in fact, filed in the proper office. And, unless it was done within sixty days after the lumber was furnished and labor done, no lien on the property existed. But as it seems to have been agreed by the parties the statement was filed, we will have to regard all done that was required to perfect the lien.

It seems to us the alleged fact two of the insured houses were vacant and unoccupied when destroyed by fire does not impair or at all affect the right of plaintiff to recover on account of the other two so destroyed, each of which was insured at the sum of \$250. To construe the contract other-

wise would be plainly contrary to both the language and reason of it. To that extent then the first ground of defense is unavailable.

That part of the policy upon which the second cause of defense rests is as follows: "If the property, or any part thereof, shall be sold, conveyed, encumbered by mortgage or otherwise, or any change takes place in the title, use, occupation or possession thereof whatever, or *if foreclosure proceedings shall be commenced*, or if the interest of the insured in said property, or any part thereof, is or shall become any other or less than legal and equitable title and ownership, free from all liens whatever, except as stated in writing hereon; or if the buildings or either of them stand on leased ground, or land of which the assured has not a perfect title, or if this policy shall be assigned without written consent hereon, then and in every such case this policy shall be absolutely void."

In order to decide whether the stipulations quoted were intended to apply to and comprehend a statutory lien, such as the one in question, it is proper to consider the situation and relative attitude of the parties, as well as the leading purpose the insurance company had in making these conditions parts of the contract. And it is not to be presumed that either present or subsequent existence of the statutory lien was in contemplation of the parties, unless it was calculated to defeat or materially affect that leading purpose which was, in language of counsel, "to provide against a state of case when it should cease to be the interest of the assured to preserve the property."

It can be reasonably assumed that the amount due the lumbermen and builders being less than the amount for which the dwelling houses alone were insured, was very much less than aggregate value of the buildings and land

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wherever they were situated, and upon both of which they were entitled to the lien. That lien, therefore, did not nor could naturally or probably cause plaintiff to cease being interested in preservation of the property.

In the clause quoted it is provided that "if foreclosure proceedings shall be commenced," the policy is to become void. But no such proceedings can be had under our system of practice, and, manifestly, the language used was not intended to apply to enforcement of a statutory lien like the one under consideration. Nor is there any language in the contract that shows at all satisfactorily the parties intended the policy to be void in case the lumbermen and builders asserted and enforced their lien. For the company not only knew, but it is recited in the policy, the buildings insured were then under way of construction, and privilege was given to the insured to complete them. And as the lumbermen and builders, in express language of the statute, already had a lien, which could not be defeated, it is plain, or at least the contract can not be fairly so construed as to justify the conclusion, either existence or enforcement of that lien was intended to render the policy void.

This court has held that levy of an execution upon insured property did not have effect to render a policy of insurance void, while the owner and debtor retained possession. (*Phoenix Insurance Co. v. Lawrence*, 4 Met., 15.) And in our opinion there is no more reason for avoiding a policy merely because a lumberman and builder has acquired the statutory lien, and should not be so adjudged, unless it is plainly so provided in the contract of insurance, which was not done in this case.

In our opinion the answer did not contain a defense to the action, except as to the two houses vacant and unoccu-

pied when burned, and it was error to overrule the demurrer to it.

Wherefore the judgment is reversed for proceedings consistent with this opinion.

CASE 91—PETITION EQUITY—JUNE 1.

Graves, &c v. Spurr, Trustee.

APPEAL FROM CLARK CIRCUIT COURT.

1. DEVISE OVER UPON DEATH WITHOUT ISSUE.—Where a testator devised to a granddaughter, one of five children of a deceased daughter, one-fifth part of certain land, "to make her one equal portion with her brother and sisters, and at her death to her child or children, and if she leave none to her brother and sisters," with the same limitation over as to the share of each of the other grandchildren, upon the death of the granddaughter without issue her share passed not merely to her surviving brother and sisters, but also to the child of a sister who had died since the testator, that child taking by descent the interest which her mother, if living, would have taken, the interest of each of the original devisees in the share of any one of them that might die without issue being so far a vested interest as to be descendible.
2. CONTINGENT ESTATES—WHEN DESCENDIBLE.—All contingent estates of inheritance as well as springing and executory uses and possibilities coupled with an interest, when the person to take is certain, are transmissible by descent, and are devisable and assignable. If the person be not ascertained then they can not be either devised or descended at the common law. This uncertainty as to the person is usually held to arise where the estate is given over, after a life estate, to the survivor of a class of persons, but that is not the case here.
3. ALL WILLS SPEAK AS OF THE DATE OF THE DEATH OF THE TESTATOR, and must be interpreted in the light of all the surrounding facts and circumstances, considering the estate in hand and the objects of the testator's bounty.

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4. EVERY TESTATOR IN MAKING HIS WILL SHOULD BE PRESUMED TO KNOW THE LAW of his domicile with reference to devises and also the law of descents.

BRONSTON & ALLEN AND G. B. NELSON FOR APPELLANTS.

1. The appellee does not take *as devisee* the share which his mother, if living, would take. The term "brother and sisters" does not include the children of brother and sisters.
2. The will created in Mrs. Goff a contingent remainder which never took effect because of her death before the happening of the contingency; and therefore appellee does not take by descent from her. (Fearne on Remainders, 150; Gorham v. Betts, 86 Ky., 165; Leppes v. Lee, 92 Ky., 17.)

JAMES F. ASKEW ON SAME SIDE.

The words of the will are plain and unambiguous. The term "brother and sisters" does not include nephews and nieces. The intention of the testator is to be gathered from the language of the will. (Fields v. Fields, 14 Ky. Law Rep., 866; Best v. Conn, 10 Bush, 37; Prescott v. Bayless, 79 Ky., 252; Gorham v. Betts, 86 Ky., 165; Birney v. Richardson, 5 Dana, 429.)

BRECKINRIDGE & SHELBY FOR APPELLEES.

1. Where there is a devise to several with a limitation over, in the event of the death of either without issue, to the others, the issue of one of the devisees who has died will take the interest of his parent in the share of one subsequently dying without issue; and to such an extent is this result favored that even where the limitation over is in terms to "the survivors," the word "survivors" is often construed as "others" in order to effectuate it. (Wilmot v. Wilmot, 8 Vesey, Jr., 10, Birney v. Richardson, 5 Dana, 429; Harris v. Berry, 7 Bush, 113; 2 Redf. on Wills, chap. XIV, clause 15, page 765; Smith v. Osborn, 6 House of Lords Cases, 393, 399.)
2. The contingent interest of each of the devisees in the portions of the others is a descendible one; so that the issue of a predeceased member of the class takes by inheritance its ancestor's right in the share of one subsequently dying under the prescribed conditions. (4 Kent, side page 261-2; Jones v. Roe, 3 Term Rep., 88; Winslow v. Goodwin, 7 Met. (Mass.), 377-83; 1 Redf. on Wills, page 391 (chap. IX, clause 18); 2 Id. page 759 (chap. XIV, sec. 70, clause 7), 1 Fearne on Rem., side page 364; 20 Amer. & Eng.

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Ency. of Law, 968-9; Note to Snelling v. Lamar, 17 Am. St. Rep., 840; Cummings v. Stearns, 161 Mass., 506.)

JUDGE GRACE DELIVERED THE OPINION OF THE COURT.

The questions in this appeal arise on the will of Jacob Hughes, published in 1874, in which he undertook to provide for his grandchildren, of whom there were two sets; one, the children of his daughter, Julia Sheffer, and the other the children of another daughter, Jane Graves. Of the former, there were four, and of the latter there were five.

Testator divided his estate into two equal parts, and gave to each set an equal proportion of one-half, thus dividing his estate, as to the Sheffer children, into four parts, and as to the Graves children, into five parts. Of the Graves children there were one son and four daughters. The clause of his will upon which the question arises is as follows, viz:

"I give to Richard Spurr, W. T. Hughes and Jacob H. Graves and their survivors in trust, for the use and benefit of Eleanor Graves, one-fifth part of the one-half the land that I die possessed of, to make her one equal portion with her brother and sisters, and at her death to her child or children, and if she leave none, to her brother and sisters."

By a similar clause testator gave to each of the sisters, Elizabeth, Julia and Harriet, and to the only brother, Jacob H. Graves, one-fifth of one-half of his estate for life with the same limitation over to the child or children of each, and if none, then to the brother and sisters. Similar bequests, with similar limitations, were made to his grandchildren, the Sheffers.

After the death of testator, his granddaughter, who had married one L. D. Goff, died, leaving the defendant, Ben

Douglas Goff, her only child and heir at law. And after this his granddaughter, *Eleanor*, who had married one Coleman, died without issue, and the contest in this suit is whether on the death of Mrs. Coleman her one-fifth interest in the land received from her grandfather, Jacob Hughes, descended to her two surviving sisters and her brother only, or whether Douglas Goff, the child of Julia Goff, takes an equal interest with his aunts and uncle. And this is to inquire whether his mother, Julia Goff, took such an interest over by way of contingent remainder, under testator's will, in the property given her sister Eleanor Coleman, as was, under the law, descendible to her child. The court below held in the affirmative, and gave to Douglas Goff one-fourth of his aunt's estate.

On this question, the earliest case in Kentucky is that of *Birney v. Richardson and others*, decided in 1837, and found in 5 Dana, 424. The opinion of the court was delivered by Judge Robertson. In that case, on a careful consideration and review of the authorities, citing some English cases, considering a clause in the testator's will, providing, after giving his estate to his wife for life or during widowhood, that on her marriage the estate should be divided equally between his five children, naming them, and then declaring "that (if) any or either of the above mentioned children should die without a lawful heir, begotten of their body, then his or her part of the estate to be equally divided among my *surviving children*," the court held that the children of two of these heirs who had died, took equal shares with two others who survived, of the portion given to the other sister, who had died childless. In that case the court referred to *Roper on Legacies*, page 426, and to *Wilmot v. Wilmot*, 8 Vesey, Jr., 10, and said, according to that and several other analogous

cases, it would seem that when a bequest is made to the survivors of one of several children dying without issue, the testator should be understood to mean, by survivors, his *other children* unless they also had died without issue, because his presumed object was that all who should have issue should be entitled to an equal interest, and that nothing but death without issue should disturb that equality."

And the court further said: "We are, therefore, ~~inclined~~ to think that each of Mrs. Birney's sisters who died leaving issue, had, *when living, such an interest in these slaves* as was transmissible, though *prospective and contingent*." The question was again before this court in 1870, in the case of *Harris v. Berry*, 7 Bush, 113, opinion also by Judge Robertson, and the same conclusion was reached. This was under the will of Benjamin Berry, who, after devising his estate equally to his fifteen children (all then living), said: "Should any of my children die before attaining lawful age, or without lawful issue, the portion of my estate bequeathed to them to be equally divided between the *survivors*." Speaking of this will, the court said: "The leading purpose of the testator was to equalize his estate among his children and to secure it to his own descendants. This is manifest and needs no argument to prove it. Consequently, to confine the distribution of his estate to the *four surviving children* of the testator, and cut off the surviving representatives of his dead children, would seem to conflict with his own evident purpose of equality. The language of the provision quoted on that subject does not require such a restriction.

Survivors, as written, is a flexible term, not necessarily meaning the testator's surviving children only, but when molded by the context and spirit of the will, may consistently with the literal import comprehend all his surviving descendants who were intended to be beneficiaries.

The court cites and approves the case of *Birney v. Richardson*, in 5 Dana, 429, and also the former authority cited in that case.

These are both strong cases in this, that in each the term survivor or surviving children has been so construed as to admit the issue of such children as had died in the meantime.

We have examined the case of *Wilmot v. Wilmot* cited. It fully sustains these two decisions, and speaks of the interest of each child as being a vested interest at the *death of the testator*, and so descendible. And that the child of a dead child took equally with a surviving brother or sister of the original devisee. This case was decided by the English courts in 1802.

We have examined the English case of *Jones v. Roe*, 3 Term Rep., 88, a noted case, and this fully accords with the cases before cited. Speaking of such interests as this, the court said: "They are devisable, because the person has an interest in the estate that is known to the law"

We have examined the case of *Winslow v. Goodwin*, a Massachusetts case, 7 Met., 363. This was a case fully considered, in which a great many English cases are quoted and commented on, and all to the same effect as these two early Kentucky cases.

In this Massachusetts case an English case of *Chauncy v. Graydon &c.*, 2 Atk., 616, is cited, and Lord Hardwicke is quoted as saying: "Where either real or personal estate is given upon a contingency, and that contingency does not take effect in the lifetime of the first devisee, yet, if real, his heir, if personal, his executor, will be entitled to it."

This Massachusetts case is followed by a still later one,

Cummings v. Stearns, 161 Mass., 506, decided in 1894, to the same effect.

In speaking of this case, Jones v. Roe, and of the first Massachusetts case cited, Mr. Redfield says: "Every contingent remainder and executory devise may be regarded, as so far of the nature of a vested interest as to be transmissible and devisable, provided, the contingency upon which the estate depends finally *turns up*, notwithstanding the testator (devisee) may have deceased before the estate becomes absolute in him."

Mr. Kent in vol 4, lecture 59, *262, says: "All contingent and executory interests are assignable in equity, and will be enforced, if made for a valuable consideration. And it is settled that all contingent estates of inheritance, as well as springing and executory uses and possibilities, coupled with an interest, *when the person to take is certain*, are transmissible by descent, and are devisable and assignable. If the person be not ascertained, then they are not possibilities coupled with an interest, and they can not be either devised or descend at the common law. Contingent and executory, as well as vested, interests pass to the real and personal representatives, according to the nature of the interest, and entitle the representative to them, when the contingency happens."

Again, the same author says: "Executory devises are not mere possibilities, but certain and substantial interests and estates, and are put under such restraints only as may prevent the mischiefs of perpetuities."

Mr. Fearne, p. 369, says: "In all cases where the *person to take is certain*, then these estates are descendible and devisable."

The difficulty occasionally met with in estates of this character is where both the person to take, as well as the

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contingency upon which he is to take, are uncertain. Then the courts say, that this is a mere possibility of which the law will not take notice, so as to make it descendible or devisable.

This uncertainty as to the person is usually held to arise when the estate is, after a life estate, given over to the survivors of a class of persons or of any given number of persons named, then the person who is finally to take upon the happening of the contingency is uncertain.

This trouble, however, does not arise in this case, as the limitation here is as to each grandchild that may die without issue, that then the interest given it shall go to his or her brother and sisters.

This will, like all other wills, speaks as of date of the death of the testator, and must be read and interpreted in the light of all the surrounding facts and circumstances, considering the estate in hand and the objects of the testator's bounty as well. So, that, when in this case the testator speaks of his five grandchildren of the Graves family, he comprehended and provided for all, giving to each a life estate, and carrying same over to the child or children of each, and in the event of the death of either without issue to his or her brother or sisters, considering them as they then lived, and vesting in each of them at that time the possibility of this estate or their respective interests in same, upon the death of either without issue. This was the only condition upon which it should pass away from either, and upon this condition happening it went to the others.

The testator does not say that in the event of the death of Eleanor Graves without issue then her interest shall descend to her brother and sisters, *provided, however*, that the issue of any grandchild who may have died shall

not inherit an equal portion with the sisters and brother who shall survive.

This would have been in direct conflict with that purpose of exact equality that he contemplated between all his grandchildren and their descendants; and that the interest of neither should pass away nor be diverted from this general purpose of equality, except only in the event of some one dying without issue.

This was distinctly not a devise over, in the event of failure of issue in any one, to the *surviving* sisters and brother; this objectionable term is not used. Such a word as we have seen might and would, unless controlled by other expressions of the will, make the person who was to take uncertain.

In addition it may be safely said that every testator, in making his will, should be presumed to know the law of his domicile with reference to testamentary devises. And if so, that in this case the testator knew that the right of survivorship was unknown to the laws of Kentucky; that it had been long before repealed. And further, that he knew the law of descents as well, and that our statutes provided that "when a person having any right or title to any real estate of inheritance shall die intestate as to such estate, it shall descend in parcenary to his kindred, male and female, in the following order.

"First, to his children and their descendants." . . .

And again, turning to that chapter of our statutes construction, we find that the words "real estate," or "land," shall be construed to mean lands, tenements and hereditaments, and all rights thereto and interests therein, other than a chattel interest. So that when the testator, Hughes, provided that on the death of either of his grandchildren without issue, the interest given such grandchild should go

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to its brother and sisters, he did all that was necessary for him to do, knowing that in the event of the death of either leaving issue, his or her issue would take by inheritance, in the place of its father or mother, the same interest that they would have taken had they been living.

It only remains to notice briefly two cases relied upon by appellants. First, the case of *Gorham v. Betts*, 86 Ky., 164, where a testator, after creating a life estate, devised the remainder to his children, a family of three daughters and two sons, in equal shares, and providing that in the event of the death of either of his daughters without issue, her interest should go to her sisters *only*. This expression the court construed to mean equivalent to *survivor* or *surviving sister*, and so excluded the child of a deceased sister. In that case it may be said that while both the English and American cases were cited by counsel, substantially the same as those now cited for appellee, they were not noticed or discussed by the court, no reference being made to the Kentucky cases.

The other case relied on by appellants is the case of *Leppes v. Lee*, 92 Ky., 16. No authority was cited by counsel for the devisee of a deceased brother, claiming his interest, except some statutory provisions, and while there may be some points of distinction in this case from those earlier cases in Kentucky before quoted, yet they were not quoted in the opinion, not considered and, of course, not overruled.

Therefore, we conclude that the interest that was given by the testator, Hughes, to his daughter Julia, to take an equal share with her brother and sisters, of the estate of any other sister or of her brother, dying without issue, was so far a vested interest in her as to be descendible, under the law, to her son Douglas Goff, and that he is entitled to

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one-fourth interest in his aunt Eleanor Coleman's lands, given her by her grandfather, she having died without issue.

Judgment affirmed.

CASE 92—PETITION ORDINARY—JUNE 6.

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APPEAL FROM JEFFERSON COURT OF COMMON PLEAS.

VENDOR AND VENDEE—WARRANTY.—Where the original vendor of a city lot by the contract with his vendee reserved a building on the lot which belonged to a lessee, and the vendee, who afterward resold the lot at a profit without excepting the building, procured the original vendor to make a deed of general warranty directly to the purchaser, knowing that the deed did not contain a reservation of the building, the original vendor having been compelled under his covenants of warranty to pay to the grantee the value of the building, which was removed by the lessee, is entitled in this action against his vendee to recover the amount so paid together with reasonable counsel fees, the warranty of the appurtenances being embraced in the deed for the purpose of carrying out the contract made by the defendant with the grantee, the plaintiff, by his contract with defendant, expressly refusing to make such a warranty.

B. F. BUCKNER FOR APPELLANT.

1. The intention and purpose with which the annexation is made will determine whether it becomes a part of the freehold or not. In this case the annexation was made with a temporary purpose, with no intention of benefiting the freehold, but upon the contrary under a contract of removal. Therefore, these improvements so called were never immovable fixtures but remained and were personal property and did not pass by the deed of Deppen to Russell & Bright. (Kent's Com., 402; Taylor's Landlord and Tenant, sec. 550; Tillman v. De Lacy, 80 Ala., 103; Hunt v. Potter, 47 Mich., 197; Hellawell v. Eastwood, 6 Exch., 309; 8 Am. & Eng. Enc. of Law, 43; Teaff v. Hewitt, 1 Ohio St., 511; Hill v. Sewald, 53 Pa. St., 271; Seeger v. Pettet, 77 Pa. St.; Allen v.

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- Mooney, 130 Mass., 155; Wheeler v. Bedell, 40 Mich., and cases there cited; Saint v. Pilley, 10 Exch. (L. R.), 137; *In re Moser*, 13 Q. B. D. (L. R.), 738; *Ex parte Glegg*, 19 Chan. Div. (L. R.), 7; Morris' Appeal, 88 Pa. St., 369; Hunt v. Mullanphy, 1 Mo., 508; Laird v. Railroad, 13 Am. St. Rep., 564; Hutchins v. Masterson, 46 Texas; Rogers v. Crow, 40 Mo., 91; Crane v. Brigham, 11 N. J. Eq., 35; Potter v. Cromwell, 100 Am. Dec., 491; Thomas v. Crout, 5 Bush, 37; Davis v. Eastham, 81 Ky., 116.)
2. Even if the annexations were a part of the realty they passed to the vendee, and the payment of the money by Deppen to Russell & Bright could not possibly have been in discharge of any legal liability.
 3. Whether a particular article is a fixture or not is a mixed question of law and fact and should have been left to the jury under proper instructions. (Tillman v. De Lacy, 80 Ala., 103; Allen v. Mooney, 130, Mass. 155; Leonard v. Stickney, 131 Mass., 541; Campbell v. O'Neill, 64 Pa. St., 290; Grand Lodge v. Knox, 27 Mo., 315.)
 4. A fraud is never imputed from mere silence unless the party in question was under a legal obligation to speak with reference to the matter at issue. (8 Am. & Eng. Enc. of Law, p. 644; 2 Pomeroy's Eq. Jur., secs. 902-904.)

HUMPHREY & DAVIE FOR APPELLEE.

1. Deppen having signed a deed, at Edmunds' request, conveying the land to Russell & Bright (who were Edmunds' vendees); and the deed being so worded, by Edmunds, as to make Deppen liable for the failure of title to the improvements on the land; there was an implied agreement on the part of Edmunds to indemnify Deppen against any loss he might thereby incur. (Bibb v. Allen, 149 U. S., 499; Dugdale v. Lovering, Law Rep., 10 Com. Pleas, 196; Curtis v. Fidler, 2 Black, 478; Dupuy v. Johnson, 1 Bibb, 564.)
2. When an act is done by the plaintiff at the request and for the benefit of defendant, and the doing the act has rendered the plaintiff liable to a third person, and that third person has enforced that liability against plaintiff; plaintiff is entitled to be indemnified by the defendant at whose request he did the act; and the law will imply an agreement to so indemnify. This rule is a general one, and is not confined to cases of principal and agent. (Dugdale v. Lovering, Law Rep., 10 Com. Pleas, 196.)
3. The conveyance of the land with a covenant of general warranty, which Edmunds procured Deppen to sign, was a warranty that the improvements on the land would pass with the land and belong to the vendee; and, as the improvements did not in fact pass with the land, but were owned and removed by the Barber

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Asphalt Company, there was an immediate breach of the covenant, which rendered Deppen, at once, legally liable to the vendees for the value of the improvements. (*Mott v. Palmer*, 1 Comstock, 564; *Van Waggoner v. Van Nostrand*, 19 Ia., 422; *Barlow v. McKinley*, 24 Ia., 69 ;*Burcher v. Parker*, 43 Mo., 443.)

JUDGE GRACE DELIVERED THE OPINION OF THE COURT.

This is an appeal by Sterling E. Edmunds from a judgment rendered against him by the Jefferson Court of Common Pleas, in favor of J. L. Deppen, Jr., for two hundred dollars.

The contest arises out of the following real estate transaction, viz: That on the 21st day of March, 1887, Deppen, who was the owner of a certain lot of ground in the city of Louisville, on the east side of Third street, gave an option or authority to Buchanan Bros. to sell said lot. This was in writing and reads as follows:

Louisville, Ky., March 21, 1887.

"Messrs. Buchanan Bros.: I hereby authorize you to sell my Third-street lot, south of Shipp street, fronting 105 feet, for fifty dollars per foot. Improvements do not go with lot. This offer to hold good till to-morrow, March 22d, till 3 p. m.

"(Signed) J. L. Deppen, Jr."

"I accept the foregoing proposition, said lot being situated on the east side of Third street, beginning 52½ feet north of Hill street and running northwardly on Third street one hundred and five feet, total price, fifty-two hundred and fifty dollars. Terms one-third cash, remainder in one and two years, with 6 per cent. interest and lien.

"(Signed) S. E. Edmunds."

"I approve the above.

(Signed)

"J. L. Deppen, Jr."

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It appears that on the same day of his purchase of this lot, S. E. Edmunds placed same in the hands of the same firm, Buchanan Bros., to sell for him, and that on that day or the next, Buchanan Bros. had some conversation with John C. Russell, in reference to a sale of this lot to him, and that on the 23d day of March, Edmunds and Russell being brought together by reason of this agency, Edmunds sold this lot to Russell as evidenced by this paper.

"Louisville, Ky., March 23, 1887.

"I have, this day, purchased of Sterling E. Edmunds, his lot purchased of J. L. Deppen, Jr., of 105x190 feet, on the east side of Third street, between Hill and Shipp avenues, the terms \$3,700 cash; balance in two notes of one and two years at 6 per cent interest. (Signed)

"J. C. Russell."

It will be observed that the full consideration to be paid in this sale is omitted, by mistake. It was at \$70 per foot front, and no disagreement arises on this point. It appears that before the date of these sales, Deppen had leased this vacant lot of ground to the Barber Asphalt Co., which lease did not expire until May following, and that company had put up a temporary rough building or structure, the lower part built of brick and the upper portion of wood. That upon this brick foundation the lessee had placed its boiler, or iron tub or tank, used in melting and mixing the asphalt, used by it in construction of Third and possibly some other street. That a shed extended out some distance from or around this tub or tank to shelter and protect the material used, and that by the terms of the lease the Barber Asphalt Co. had the right to remove this structure and trade attachments from the premises at any time within their lease, and this is the structure referred to by Deppen in his op-

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tion to Buchanan, where he says: "Improvements do not go with the lot," the same under which Edmunds bought.

It further appears in the evidence that during the negotiation of this sale by Edmunds to Russell, this structure or building was pointed out, mentioned and discussed, the parties differing somewhat as to the exact language used, though Russell insists that Edmunds extolled its value and expressed the opinion that same could be sold for a considerable little sum of money and that it added to the price and value of the lot, while Russell concedes that he attached but little importance to it, and insisted that it was of little value, and that he might have to employ and pay some one to remove same, that as it then stood on the property it was an eyesore, etc.

At any rate both parties agree that it was not excepted in the sale by Edmunds to Russell, nor does either party affirm, in any manner, that Russell or Bright (who it finally develops was Russell's partner in this purchase) had any knowledge of this lease by Deppen to the Barber Asphalt Co., or that it had erected this structure, or that it had any right to remove same from the lot so sold by Edmunds to Russell. Russell and Bright deny all knowledge on this matter, though expressly reserved by Deppen in his sale to Edmunds. Soon after this sale by Edmunds to Russell, which it will be observed was made at an advance of \$2,100 over the price that Edmunds was to pay Deppen for same, it occurred to Edmunds to state this re-sale to Deppen, and to inquire of Deppen whether he would not as soon make his deed directly to Russell as to him, Edmunds, taking Russell's notes for the deferred payments. Deppen said certainly, that he knew Mr. Russell very well, and so he got his money he did not care.

This matter was also understood with Russell and Ed-

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munds, and they agreed that Russell should pay in cash to Edmunds his profit of \$2,100 in this lot, and then make the cash payment and execute his note to Deppen for the consideration or purchase price at which Edmunds had bought of Deppen.

So the 30th of March was fixed for a meeting of all parties to consummate this transaction, and at this meeting it seems that the Buchanans (a younger man and not a member of the firm), being interested in Edmunds' profit, had prepared a deed from Deppen and wife to Russell for this lot, fixing the cash payment to Deppen and the time notes, with lien retained, all as by the sale of Deppen to Edmunds. That Deppen supposing, as he says, the deed was all right and contained the reservation of this building or structure owned by Barber Asphalt Co., as reserved in his sale to Edmunds, signed and delivered this deed, only examining the boundary or description of the lot and not noticing that there was no exception in the deed. Deppen says he signed this deed at the instance of Edmunds, as indeed he must.

Some time after this Russell and Bright sell the building and structure to one George Hoertz for two hundred and fifty dollars, and Hoertz, working some two days in tearing down same was discovered by the Barber Asphalt Co., who ousted Hoertz and proceeded themselves to remove this building and the material, and so Russell and Bright lost this sale. And complaining to Edmunds, he denies any and all responsibility, and complaining to Deppen, Deppen says: "I reserved this in my sale to Edmunds and he understood all about it."

Russell, however, insists on the general warranty in the deed of Deppen to him, of this property, and the clauses passing all appurtenances, and to the covenants by Deppen that he is lawfully seized in fee simple, that he had full

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right and power to convey the same, and that said property is free from all incumbrances. After some controversy on this matter, Deppen recognizing his liability, under the covenants in his deed to Russell, paid him \$150 in satisfaction of this claim, and Edmunds refusing to reimburse him and denying his responsibility, Deppen filed this suit.

Issue was formed on the material allegations made by Deppen. A jury trial was had, on which the court instructed the jury:

1. "That if the jury believe from the evidence that the defendant induced the plaintiff to convey the land mentioned in the petition, to Russell and Bright, and that the defendant knew the deed conveying said property did not except therefrom the structure or improvement upon the land conveyed, then the law is for plaintiff and the jury should award him such a sum in damages as they believe from the evidence the plaintiff was compelled to pay Russell and Bright on account of said improvements, not exceeding their reasonable value and not more than one hundred and fifty dollars, and for any reasonable sum he may become bound for, as counsel fees, because of such conveyance, not exceeding the further sum of fifty dollars.

2. "But if the jury believe from the evidence that the defendant did not know that the deed from plaintiff to Russell and Bright did not except therefrom the structure upon the lot conveyed, and that he did not prevent the plaintiff from examining the deed and learning its contents, then the law is for the defendant and the jury should so find." The jury found for plaintiff in the sum of two hundred dollars.

We are of the opinion that the instructions embrace a correct principle of law, and that the evidence authorized the finding of fact in favor of plaintiff. It is clear that this

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building was excepted by the sale of Deppen to Edmunds, as it is equally clear not only that it was not excepted in the sale of Edmunds to Russell and Bright, but that its existence was distinctly pointed out and relied on by both parties to this last sale, and clearly understood and recognized by both Edmunds and Russell as being a part of the property sold, and to be conveyed by Edmunds to Russell. And in this view of the case the court has thought it wholly unnecessary to go into an examination of the principle, or the many learned authorities, defining fixtures movable and immovable, or trade fixtures, and whether, thereunder or thereby, this building would or would not pass under a deed of general warranty of land with all appurtenances belonging to same, and under the other clauses in this deed of Deppen to Russell, assuming that nothing had been said by either party in either sale in reference thereto. We do this because in this case the parties have, by their own express contract, indicated the position of this building and structure; Deppen expressly reserving it and Edmunds as expressly pointing it out and insisting on its value in his sale to Russell; of course, this matter of fixtures, movable and immovable, being always subject to the express contract of the parties, vendor and vendee.

Now, when Deppen, having reserved or excepted this building in his sale to Edmunds, and only made his deed to Russell, at the instance and for the benefit of Edmunds, he, Deppen, had no right to suppose or to suspect even that there was any other obligation in his deed of warranty than that he had bound himself to make to Edmunds. While Edmunds, on the other hand, knowing that he had made no exception of this property, in his sale to Russell, had no right to suppose that Russell would accept from him

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or from Deppen a deed excepting any part of this property he had sold to him, so that no money could be coerced out of Russell, either for himself, Edmunds, or for Deppen, unless Russell obtained a deed for the property he had bought without any reservation or exception whatever. So in this transaction one paper would not answer both purposes, could not fulfill the requirements of both contracts.

The deed was, in fact, made to conform to the contract made between Edmunds and Russell, and on this deed made by Deppen, Edmunds secured his full profit in his sale to Russell, and so this deed was not only made at his instance, but contained, as afterwards discovered by Deppen, clauses of warranty inconsistent with and in excess of his contract of sale to Edmunds, and this to the damage of Deppen in the sum of two hundred dollars.

This damage he incurred by doing the act that Edmunds requested him to do, and this act resulted in profit to Edmunds. In such a case we think the law, equity and good conscience implies a promise and raises an obligation by Edmunds to repay and save harmless Deppen. This has been secured in the trial below by the court and the jury.

Judgment affirmed.

Smith v. Jones, &c.

CASE 93—PETITION EQUITY—JUNE 8.

Smith v. Jones, &c.

APPEAL FROM BOYD CIRCUIT COURT.

1. A COVENANT OF GENERAL WARRANTY IN A DEED to land is equivalent in substance to the several special covenants in use under the common law, as that the grantor is seized of the land sold, that he has good and perfect right to convey, that the land is free from incumbrances, that the grantee shall quietly enjoy possession and that the grantor will warrant and defend the title against all claims of all persons. Therefore, such a covenant is sufficient to compel the grantor before receiving the full amount of the purchase money to pay off and discharge all outstanding unpaid liens on the property.
2. WHERE A VENDEE IS IN POSSESSION OF LAND UNDER A DEED OF GENERAL WARRANTY and the vendor is solvent the vendee can not resist the payment of the purchase money, although there may be a defect in the title, provided the vendor acted in good faith.

In this action to recover the purchase price of land of which the defendant is in possession under a deed of general warranty the fact that there is in the deed of a remote vendor a clause prohibiting the sale of intoxicating liquors on the premises and providing for a reversion in the event they shall be so used, constitutes no defense, the vendors having acted in good faith and one of them being solvent.

THOMAS F. HARGIS FOR APPELLANT.

The appellant never agreed to risk the warranty of the appellees except upon the faith of their representations that the property was free from incumbrances and the title to it good, and as appellees fraudulently suppressed the fact as to the existence of the restriction as to sale of liquor upon the premises, the appellant is entitled to protection. The appellant can not suffer eviction, but the use of his property is restricted, which is a perpetual cloud upon his title. The moment the warranty was made it was broken because the title was then defective. (*Pryse v. McGuire*, 81 Ky., 608.)

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JNO F. HAGER FOR APPELLEE.

1. Even if the deed in this case contained a covenant against incumbrances it would afford no right to defendant to retain purchase money as he shows no loss, or grounds to apprehend loss, by reason of the incumbrances alleged. (*Eaton v. Lyman*, 30 Wis., 41; *Rawle on Covenants, &c.*, sec. 188.)
2. As appellant is in the peaceable possession of his property by virtue of a conveyance containing a covenant of general warranty, and there is entire absence of fraud, insolvency or non-residency on the part of his vendors, he can not resist the payment of the purchase price. (*English v. Thomason*, 82 Ky., 280; *Simpson and others v. Hawkins, &c.*, 1 Dana, 303; *Taylor v. Lynn*, 2 Dana, 276; *Duvall v. Parker*, 2 Duv., 187; *Trumbo v. Lockridge*, 4 Bush, 415; *Buford's case*, 14 Bush, 690.)
3. Even with the plea of the insolvency of appellant's vendors there is failure to state facts sufficient to authorize the equitable relief of rescission. (*Rawle on Covenants for Title*, sec. 381; *Mauer v. Washington*, 3 Strobb., Eq., 171; *Latham v. Morgan*, 1 S. & M., Chy., 617.)

JUDGE GRACE DELIVERED THE OPINION OF THE COURT.

This is an appeal by Joseph G. Smith, from a judgment rendered against him in the Boyd Circuit Court, in favor of Catherine Jones and her husband, J. Paul Jones, on two notes of \$2,000 each and interest, same being executed by appellant for the unpaid purchase money on three certain lots in the city of Ashland, bought of Jones and wife in 1890.

In this sale a deed of conveyance was made and accepted by the purchaser, retaining lien for these unpaid purchase notes, and containing the usual clause of "general warranty" of title. This means by express declaration of our statute law in Kentucky that the grantors in any such deed covenants on behalf of himself, his heirs and personal representatives, that he will forever warrant and defend "the said property unto the grantee, his heirs, personal representatives and assigns, against the claims and demands of all persons whomsoever."

And by a further statute the words "real estate" or "lands" shall be construed to mean lands, tenements and hereditaments, and all rights thereto and interests therein.

This term used by the grantor in a deed that he conveys by or with "general warranty," has been often held by this court to be in substance equivalent to the several special covenants in use under the common law, as that one is seized of the land sold, that he has good and perfect right to convey, that the land is free from incumbrances, that the grantee shall quietly enjoy possession, and that the grantor will warrant and defend the title against all claims of all persons. *Butt v. Riffe*, 78 Ky., 352, and *Pryse v. McGuire*, 81 Ky., 608, as well as in numerous other cases.

In this case the covenant of general warranty is all sufficient for the protection of Smith, in the full, complete, unrestricted use and enjoyment of the land sold, free from all incumbrances, and is sufficient to compel the grantor, before receiving the full amount of the purchase money, to pay off and discharge all outstanding, unpaid liens on the property, and this, the evidence shows, had been done before the rendition of the judgment for the purchase money; in fact, before suit brought.

Another matter complained of by Smith as being an incumbrance or restriction of the free use and enjoyment of his property bought, is that he says, in the deeds made by his remote vendors, the Kentucky Iron, Coal and Manufacturing Company (who, it seems, were the owners of all this land as early as 1854), embraced in each of their several deeds to their immediate vendees, this clause:

"Grantee accepts this deed subject to the following provision, that if he, his heirs or assigns, shall sell or permit to be sold, upon said premises, intoxicating liquors of any description, then this deed to be void and title to revert to the

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grantor, provided that in case of such reversion there shall be paid to the grantee, his heirs or assigns, one-half the value of said property, to be determined by the appraisement of three parties, to be appointed by the grantor."

The pleadings admit that this clause appears in several of the deeds of the remote vendors of the plaintiffs in this case, but not in either of the deeds under which the grantors in this case obtained title, the last deed wherein this clause did appear being in 1872. It is not claimed by the defendant Smith that this property was suitable, either in its building or location, for saloon purposes, nor that he ever contemplated selling spirituous liquors on same, nor that he had been in any wise interfered with, or prohibited in any way, by legal process or otherwise, from so doing; neither does he say that he has any apprehension of such proceedings, but simply that it is an incumbrance on the free unrestricted use of his property and that it has injured its salable value.

As we have seen, his warranty in his deed is sufficient to protect him in this respect, should he ever be actually disturbed in this use and enjoyment of his property. And being in possession, protected by this warranty and one of his grantors being amply solvent (worth, according to the evidence, \$20,000 or more), the uniform doctrine and practice in this court is, and for a long time has been, that the court will not interfere, that it will not cancel the contract, where executed, unless actual fraud has been perpetrated in procuring same, neither will it withhold or restrain a vendor in the collection of his purchase money on such a record.

An early, well-considered and interesting case in this court on this question is *Simpson and others v. Hawkins, &c.*, 1 Dana, 303. Other cases have followed: *Taylor v.* Vol. 97.—43.

Lyon, 2 Dana, 276; Duvall v. Parker, 2 Duvall, 182; Trumbo v. Lockridge, 4 Bush, 415; and recently English v. Thomasson, 82 Ky., 280.

In support of the title of plaintiffs in the court below, it is shown that they and those under whom they claim have had this property in actual, continuous, uninterrupted possession for more than thirty years, the extreme limit beyond which the law in Kentucky will not protect any claimant by reason of any disability. This sale was made in good faith, the grantor not doubting his title. He says he did not think, at the time, of telling Smith, his vendee, of this clause in the earlier deeds, prohibiting the sale of liquor on the premises, because, he says, that said provision had long been deemed obsolete, that for thirty years whisky had been sold in saloons (twenty or more), in the town of Ashland, without any protest by the Kentucky Iron, Coal and Manufacturing Company, who were the original owners of all that tract of land whereon this city is built, and who had a similar clause inserted in all their deeds of conveyance, of said lots. That in fact, this same company built a fine hotel in said city and sold same in 1890, wherein a saloon was then and is now kept.

It is clear that appellee was in good faith, and contemplated no fraud in the sale of his property, and where such is the case, and the contract fully executed by deed, with clause of "general warranty," and the vendor living and solvent, as we have seen, the courts will not interfere, even though a defect was shown in the title.

Wherefore, the judgment is affirmed.

CASE 94—PETITION EQUITY—JUNE 13.

***Louisville & Nashville Railroad Company v.
Commonwealth.**

APPEAL FROM JEFFERSON CIRCUIT COURT, CHANCERY DIVISION.

1. **INJUNCTION TO PREVENT RAILROAD COMPANY FROM PURCHASING PARALLEL LINE.**—A court of equity has jurisdiction in an action by the State to enjoin a corporation from exceeding its chartered powers, or doing acts otherwise illegal and injurious to the public. Therefore the State may by injunction prevent a railroad company from consummating the purchase of a "parallel or competing line" in violation of sec. 201 of the State constitution.
2. **THE WORD "PARALLEL"** as used in that section of the constitution was not used according to its strictly accurate meaning of two railroads constructed equi-distant apart through their whole extent, which would be impracticable, but in the sense of two conforming in their general direction.
3. **IN CONSTRUING STATUTES WORDS MAY BE MODIFIED, ALTERED OR SUPPLIED** so as to obviate any inconsistency with the intention of the legislature as collected from the subject matter and object of the statute, and all words, if they be general, and not expressed and precise, should be restricted to the fitness of the matter.

A clause in the charter of the Louisville & Nashville Railroad Company providing that the company may "from time to time extend any branch road and may purchase and hold any road constructed by another company or may agree on terms to receive the cars of other roads on their said road, but shall charge for same the usual freight," must be construed with reference to the subject matter, which was branch roads, and can not be regarded as conferring upon the corporation the power to purchase parallel and competing lines.

4. **POWERS OF CORPORATIONS.**—Even if the Louisville & Nashville Railroad Company had statutory power to purchase parallel and competing lines it would not have the power to purchase and hold the road of the Chesapeake, Ohio & Southwestern Company for the reason that the charter of the latter company prohibits consolidation of its capital stock with that of any other company whose lines are parallel and competing, as those of the Louisville & Nashville Company are.
5. **SAME.**—Franchises and privileges not in express terms granted to a corporation are to be regarded as withheld.

*Opinion of Supreme Court of United States affirming, reported in 161 U. S., 677.

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6. INTER-STATE COMMERCE.—Sec. 201 of the State constitution, which provides that no railroad company shall acquire by purchase "any parallel or competing line or structure, or operate the same," is not a regulation of inter-state commerce, nor does its enforcement infringe upon the power of congress to regulate commerce between the States.

HELM & BRUCE FOR APPELLANTS.

1. An amendment of January 17, 1856, to the charter of the Louisville & Nashville Railroad Company expressly gives it the power to "purchase and hold any road constructed by another company." (1 Acts 1855-6, p. 181). This was not the power merely to buy non-parallel or non-competing roads. Neither was it the power to buy only branch roads. No such words of limitation are found in the act. It was the power to buy *any* road constructed by another company.
2. The construction just mentioned of the charter provision referred to is the one which has been placed upon it both by the railroad company and the State of Kentucky for more than forty years; and under which many railroads have been purchased which could not have been lawfully acquired if the construction referred to were not correct. And since the passage of that amendment, and upon the faith of its provisions, the company has floated seventy-seven million dollars of bonds, and issued over forty-nine million dollars of stock, all of which securities have been purchased and are held by innocent holders for value. It is therefore too late now for the State to insist that the construction always heretofore given this charter provision is erroneous; and it will be a violation of good faith with investors for the State to do so.
3. The contemporaneous or practical construction of a legislative act, or in fact of any written instrument, by those interested therein, or who are called upon to carry it into effect, is entitled to very great respect. (*Harrison v. Commonwealth*, 83 Ky., 162; *Barbour v. Louisville*, 83 Ky., 102; *Sherwin v. Bugbee*, 16 Vt., 444; *State v. Severance*, 49 Mo., 401; *French v. Cowan*, 79 Me., 426; *United States v. Moore*, 95 U. S., 763; *United States v. Pugh*, 99 U. S., 269; *Five Per Cent Cases* 110 U. S., 455; *United States v. Burlington, &c. R. Co.*, 98 U. S., 241; *United States v. Hill*, 120 U. S., 182; *Thompson v. Thompson*, 2 B. Mon., 166.)
4. A charter should be construed as any other written instrument; the object being to ascertain the intention of the parties. (*Morawetz on Private Corporations*, sec. 316.)
5. Conceding for the sake of argument that a grant to a corporation

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should be strictly construed, yet this does not mean that the words therein employed shall be so restricted as not to have their full meaning. It simply means that the terms are not to be extended by implication beyond their legitimate import. (23 Am. & Eng. Ency. of Law, p. 374, under the title "Strict Construction"). Illustrations of the application of this principle are to be found in *Providence Bank v. Billings*, 4 Peters, 514; *Charles River Bridge v. Warren Bridge*, 11 Peters, 419; *Bailey v. Maguire*, 22 Wall, 215; *Stein v. the Bienville Water Company*, 141 U. S., 67; *Binghampton Bridge case*, 3 Wall., 51.

6. The proposition that there must not only be corporate power in the buying company to buy, but also corporate power in the selling company to sell, has no application, so far as the power of the selling company is concerned, to judicial sales. For the court in making the sale is not dependent upon the corporate power of the corporation whose property it sells. Hence the cases of *St. Louis R. Co. v. Terre Haute R. Co.*, 145 U. S., 404; *Pennsylvania R. Co. v. St. Louis R. Co.*, 118 U. S.; *Central Transportation Co. v. Pullman Co.*, 139 U. S., 54; *Gibbs v. Consolidated Gas Co.*, 130 U. S., 410; *E. L. & R. Co. v. Rushing*, 69 Texas, 306; *East Line R. Co. v. State*, 75 Texas, 434, have no application to the present case where the State seeks to enjoin the L. & N. R. Co. from purchasing at a judicial sale the C., O. & S. W. railroad.
7. The franchise or power to buy was not a mere license, revocable at the will of the State, but is secured by a contract. (*Dartmouth College Case*, 4 Wheaton, 518, 712.)

Moreover even "a gift, completely executed, is irrevocable." The grant of a franchise comes within this principle. And hence, even if there were no consideration for it, it is irrevocable. (*Farrington v. Tennessee*, 95 U. S., 683; *Dartmouth College Case*, 4 Wheaton, 518.) "And there is no difference between the case of a grant of land or franchise to an existing corporation and a grant to a corporation brought into life for the very purpose of receiving the grant." (*Trustees of Vincennes University v. Indiana*, 14 Howard, 275; *University v. People*, 99 U. S., 309; *New Jersey v. Yard*, 95 U. S., 104.)

Moreover, the express terms of the act granting the amendment in question show an intention to create vested rights, the language thereof being "the following rights are vested and powers created."

8. The act of February 14, 1856, providing in substance that charters and acts of incorporation to be granted thereafter, should be subject to amendment or repeal at the will of the legislature, has no effect upon the amendment of January 17, 1856, for several reasons, to-wit:

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A. Because the amendment of January 17, 1856 was passed and approved prior to February 14, 1856, and took effect immediately.

B. Even if the L. & N. amendment did not "take effect" till after February 14, 1856, yet the act of that date was manifestly not intended to affect statutes theretofore passed and approved.

This intent is plainly manifest from its terms, and is true by the ordinary rules of construction.

A retrospective effect will never be given to a legislative act if it is possible to avoid it, even though the power to make the same retrospective be conceded. (Endlich on Interpretation of Statutes, secs. 271, 272; Cooley on Constitutional Limitations, side page 62; O'Donoghue v. Akin, 2 Duvall, 479; C. & O. R. Co. v. Judge of Washington County Court, 10 Bush; Lawrence v. City of Louisville, 96 Ky., 595; Taylor v. Mitchell, 57 Penn. St., 209.)

9. Moreover, the act of February 14, 1856, reserving the power of amendment or repeal, applies only to charters granted subsequent to that date and to amendments of such charters. It does not apply to an amendment passed subsequent to that date amending a charter granted prior to that date. (New Jersey v. Yard, 95 U. S., 104, 112.)
10. The purchase by the L. & N. of the C., O. & S. W. railroad is also authorized by an amendment of the L. & N. charter granted March 7, 1854, (2 Acts 1854, page 195), making it lawful for that company to "unite" their said road with any other road connecting therewith." The context shows that "unite" as here used, means more than mere physical connection. Hence the cases of St. Louis R. Co. v. Terre Haute R. Co., 145 U. S., 405; Atchison v. Railroad Company, 110 U. S., 668, and Pennsylvania Co. v. St. Louis R. Co., 118 U. S., 311, have no application to the present case.
11. The L. & N. charter amendment, being a contract, is not repealable under the police power. Neither the lives, the health nor the morals of the people of the State demand such repeal; and even though commercial policy may dictate it, yet this is not sufficient to authorize it. If it were, then a contract with a State would be of no value whenever the commercial interests of the State might call for its repudiation. (New Orleans Gas Co. v. Louisiana Light Co., 115 U. S., 660; Crutcher v. Ky., 141 U. S., 59, 60.)
12. Section 201 of the Kentucky constitution prohibiting the consolidation or pooling of the earnings of any parallel or competing line of railroads or steamboats is simply a regulation of commerce. And so far as it applies to inter-state railroads is a regulation of inter-state commerce. It is therefore void as to such

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railroads. The business of transportation is commerce. (*Telegraph Co. v. Texas*, 105 U. S., 464; *Gibbons v. Ogden*, 9 Wheaton, 1; *Philadelphia Steamship Co. v. Penn.*, 122 U. S.) The power of congress to regulate inter-state commerce is exclusive where the matter under consideration is capable of general regulation; inter-state transportation is thus capable; and the silence of congress on such a subject means that it shall be free from State regulation. (*County of Mobile v. Kimball*, 102 U. S., 697; *Gloucester Ferry Co. v. Penn.*, 114 U. S., 204; *Philadelphia Steamship Co. v. Penn.*, 122 U. S., 336; *Bowman v. Chicago, &c. R. Co.*, 125 U. S., 485; *Covington & Cincinnati Bridge Co. v. Ky.*, 154 U. S., 212.) To "regulate" commerce or transportation means "to prescribe the rule by which that commerce is to be governed." (*Gibbons v. Ogden*, 9 Wheaton, 196; *Leisy v. Hardin*, 135 U. S., 108.) Hence a statute which provides that the charges of a railroad or bridge company shall not be greater for short hauls than long hauls, or reducing or limiting the amount it may charge for service, is a "regulation of commerce." (*Wabash Case*, 118 U. S., 557; *Covington & Cincinnati Bridge Co. v. Ky.*, 154 U. S., 204.) Although the real or professed object of a State statute may be something within its power, yet if the necessary or reasonable effect thereof is to go beyond this object and accomplish something not within its power, the statute is unconstitutional and void. (*Chy Lung v. Freeman*, 92 U. S., 280; *R. Co. v. Husen*, 95 U. S., 472; *Brown v. Chicago, &c. R. Co.*, 125 U. S., 491; *Crutcher v. Ky.*, 141 U. S., 59.)

The fact that Kentucky created the L. & N. R. Co. does not give it the power to regulate that company in all respects. If it did, then by a similar principle the regulating statutes which the Supreme Court of the United States held to be unconstitutional in the *Wabash case*, 118 U. S.; *R. Co. v. Husen*, 95 U. S., and *Cov. & Cin. Elevated R. Co. v. Ky.*, 154 U. S., 224, would all have been held constitutional; because in each instance the statute which was declared void was a statute of a State creating the corporation involved in the controversy.

13. Injunction is not a proper remedy in this cause. The answer of the defendant asserted that it was not its intention to purchase the C., O. & S. W. property at private sale, and hence it was not proper either to grant or continue an injunction against such purchase. (10 Am. & Eng. Ency. of Law, p. 783; *Whalen v. Dalashment*, 59 Md., 250.) It was not proper to enjoin the defendant from becoming a bidder at a judicial sale of the C., O. & S. W. property, because if such sale should take place while the injunction is in force, the chance to buy the property would be gone forever, though the injunction might be subsequently dis-

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solved; whereas, on the other hand, if the defendant should become a purchaser at such sale the question of its power to buy could be raised upon the motion to confirm the sale, and thus the rights of all parties be saved. And "where an injunction might cause irreparable damage to the defendant in the event of the plaintiff's not being exclusively entitled to relief, the injunction will be refused." An application for injunction is addressed to the sound discretion of the court, and the relative effect upon the parties granting or refusing the injunction will always be considered. (10 Am. & Eng. Ency. of Law, p. 783; Tuttle v. Church; 53 Fed. Rep., 428; Hall v. Rood, 40 Mich, 46; Jones v. City of New ark; 11 N. J., 456, 457; North v. Kershaw, 4 Blatchford, 470; High on Injunctions, sec. 598.)

Injunction will not be granted when there is other adequate remedy. (Connor v. Covington Transfer Co., 14 Ky. Law Rep., 135, 10 Am. & Eng. Ency. of Law, 784; High on Injunctions, sec. 28; Truly v. Wanza, 5 How., 142-3.)

This principle has often been applied to cases where *quo warranto* was the proper remedy, such as in cases of usurpation of office. (Brown v. Redding, 50 N. H., 347; Osgood v. Jones, 60 N. H., 543; Hullman v. Honcamp, 5 Ohio State 342; Hinkley v. Brun, 55 Conn., 119; Updegraff v. Crans., 47 Pa. St.) Also where the legality of a municipal corporation was sought to be tested by injunction. (Bateman v. Florida Commercial Co., 8 Sou. Rep., 517.) Also where violation of penal laws was sought to be enjoined. (M. & E. R. Co. v. Pruden, 20 N. J. Eq., 536.) Also where the common law remedy of mandamus was the proper remedy. (Rees v. City of Watertown, 19 Wall., 107-121.)

In Att'y Gen'l of New York v. Utica Ins. Co., 2 Johns Chy. 371, Chancellor Kent held expressly that injunction would not be issued to restrain the usurpation of a franchise by a corporation.

Injunction will only be allowed when the right to it is clear both on the law and facts. (Conner v. Cov. Transfer Co., 14 Ky. Law Rep., 136; City of Louisville v. Lou. Board of Trade, 90 Ky., 409; Kimball v. A. T. & S. F. R. Co., 46 Fed. Rep., 891; Tuttle v. Church, 53 Fed. Rep., 427.)

Injunction will never be granted except where there is a probability of substantial injury. "The fears of mankind do not constitute a nuisance." (Dumesnil v. Dupont, 18 B. Mon., 807; Duncan v. Central Pass. R. Co., 85 Ky., 532; Pfingst v. Senn, 94 Ky., 556; Att'y. Gen'l v. Met. Ry. Co., 125 Mass., 516; St. John v. McFarland, 33 Mich., 72; Att'y. Gen'l v. Bank of Niagara, Hopkins' Chy., 354.)

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HUMPHREY & DAVIE FOR APPELLEE.

1. The L. & N. system of railroads, and the C., O. & S. W. system, are "parallel or competing lines" in the meaning of section 201 of the Kentucky constitution, forbidding the acquiring or operation of parallel or competing lines. (*Texas v. Gulf R.*, 13 Am. St. R., 819 (72 Tex., 404); *Texas Pac. R. v. Southern R.*, 17 Am. St. R., 445 (41 La. Ann., 970); *Hafer v. Cincinnati R.*, 29 Ohio W. Law Bulletin, 71; *Stockton v. Cent. R.*, 15 N. J. Eq., 52 and 489; *State v. Atchison R.*, 8 Am. St. R., 164 (24 Neb., 143); *Pa. R. v. Comm.*, 29 Am. & Eng. R. Cases, 145, 151 (7 Atl., 368, 374); *State v. Vanderbilt*, 37 Ohio St., 599; *Rushing v. East Line R.*, 69 Tex., 313; *Currier v. Concord R.*, 48 N. H., 321; *Langdon v. Branch*, 37 F. R., 449; *Hamilton v. Savannah*, 49 F. R., 412.)
2. The L. & N. charter amendment of 1856 only empowered it to purchase "branch" lines; the powers granted being all "subject to the thirteenth section of this act," which thirteenth section only relates to "branch" lines; and the provision therein for receiving and hauling the cars of other roads on the L. & N.'s road, shows that it related to branch lines, "feeders" or connecting lines, and not to independent competing lines. (Acts of 1855-6, volume 1, 188.)
3. The canon of construction, that the court should suppose the law-giver actually present and ask him, "what did you really intend to grant," if applied here, would demonstrate that the legislature of 1856 (then engaged in passing the general reservation act of 1856, forbidding irrepealable grants), did not intend to grant to the L. & N. the right, for all future time, to buy up and operate all competing lines; but intended to limit it to "branch" lines or feeders; and the C., O. & S. W. can not be treated as a "branch" line of the L. & N. (*Ryegate v. Wardsborough*, 30 Vt., 746; *Blanton v. Richmond R.*, 86 Va., 618; *McAvoy's Appeal*, 107 Pa. St., 558.)
4. To extend the act beyond "branch" lines, would violate the canon that requires such grants to be strictly construed; to extend only to what was beyond doubt and unmistakably intended to be granted; and which forbids a corporation to secure, "by the skillful use of ambiguous terms," what the State might not have granted if asked for openly and plainly. (*Dubuque R. v. Leitchfield*, 28 How., 88; *Delaware Tax Cases*, 18 Wall., 225; *Slidell v. Grandjean*, 111 U. S., 438; *Belmont Bridge v. Wheeling*, 138 U. S., 288, 292; *Charles River Bridge Case*, 11 Peters, 552.)
5. The general words authorizing purchases of "roads" will be limited by the previous particular words "branch roads," under the

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canon of construction, that subsequent general words in a sentence will be limited to matters of the same class and kind already specifically mentioned; and not enlarged to cover things of a higher class of importance. (*Barbour v. City of Louisville*, 83 Ky., 100; *Matter of Swigert*, 59 Am. Rep., 792; *Endlich on Stat. Construc.*, sec. 400, 412.)

6. It will not be presumed that the legislature intended to violate a fixed public policy and work harm to the State, by allowing the destruction of competition and the formation of a railway monopoly, with the evils and dangers incident thereto; and hence, the act will be limited to "branch" roads or feeders. (*N. J. Gas Co. v. Consumers*, 40 N. J. Eq., 427; *Stine v. Bienville*, 141 U. S., 80; *Anderson v. Jett*, 89 Ky., 380; *Texas R. v. Southern*, 17 Am. St. Rep., 445; *Clark v. Cent. R.*, 50 F. R., 339; *Richardson v. Buhl*, 77 Mich., 658; *Cent. R. v. Collins*, 40 Ga., 482.)
7. The power will be limited to branch roads, because if extended to buying competing lines, it would be such a fundamental change in the scope of the scheme (of "a road from Louisville to Nashville") as would impair the contracts of stock-subscription and release the subscribers; and such construction will be avoided. (*Morawetz on Corporations*, 2 Ed., sec. 397, 645, 399, 1047, 1059; *Clearwater v. Meredith*, 1 Wall., 40; *Botts v. Turnpike Co.*, 88 Ky., 54.)
8. The State is not bound by any "contemporaneous construction" of this L. & N. amendment of 1856; for there never was any such construction, by any one; and, if there was, the State was not a party to, and had no notice of, such construction. It must be a contemporaneous construction by the State, to bind the State. (*Pennoyer v. McConagy*, 140 U. S., 23; *U. S. v. Alabama R.* 142 U. S., 621; *Barbour v. City of Louisville*, 83 Ky., 102.)
9. If the L. & N. ever bought any road that was parallel and competing, before section 201 of the constitution was enacted to prevent it, the State was not notified that the L. & N. claimed to do so under the amendment of 1856; and the failure of the State to then sue to rescind such purchase by the L. & N. was not a surrender of its right to now prevent this violation of the new constitution of 1891. (*Chicago R. v. Iowa*, 94 U. S., 162; *Cooley's Const. Lim.*, 6th Ed., 85, 87, Notes; *Elliott on Roads and Streets*, 668.)
10. If the L. & N. amendment of 1856 be extended beyond branch roads, it should be limited to roads that are non-competing; and not expanded to parallel and competing lines, the purchase of which had been declared to be against public policy. (*State v. Vanderbilt*, 37 Ohio St., 590; *Morgan v. Donovan*, 58 Ala., 263;

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Clark v. Cent. R., 50 F. R., 345; Elkins v. Camden R'y, 36 N. J. Eq., 12; U. S. v. Kirby, 7 Wall., 483.)

11. If the L. & N. amendment of 1856 were construed to authorize the purchase and operation of independent competing lines, it would only embrace competing lines then in existence; and would not contract away the State's power to create competing lines in future years or centuries. (East Line R. v. Rushing, 69 Tex., 306.)
12. The amendment of 1856 was without any new consideration, did not bind the L. & N. to purchase roads, or otherwise, and was contingent upon the L. & N. finding some competing road willing, and able, to sell to it. It was too contingent and unsubstantial a power to constitute an irrevocable charter contract; and was a mere privilege or license, revocable at any time, as to future purchases. (Kenton County v. Covington R., 12 B. M., 144; Philadelphia R. appeal, 102 Pa. St., 123; Johnson v. Crow, 87 Pa. St., 184; Aspinwall v. Daviess County 22 How., 377; Tucker v. Ferguson, 22 Wall., 574; Illinois R. v. Illinois, 146 U. S., 461; Morawetz on Corporations, 2d Ed., sec. 1063, 1082.)
13. The L. & N. amendment of 1856 contained no provision for it taking effect from its passage; and therefore did not take effect until May 17—"two months after its approval by the Governor." In the meantime the famous "general reservation" act of February 14, 1856, came into force, reserving the right to repeal all charters, amendments or grants; and, when the L. & N. amendment took effect, it was subject to that general reservation act, and repealable at any time. (Ky. Rev. Stat. of 1852, chap. 61, sec. 3; Public Acts of 1855-6, page 15; Howe's Estate, 112 N. Y., 100; Larrabee v. Talbot, 46 Am. Dec., 637; Rice v. Ruddman, 10 Mich., 135; Jackman v. Garland, 64 Me., 133; Price v. Hopkins, 1 Mich., 326; Davenport v. R., 37 Ia., 622; Cooley's Const. Lim., 6 Ed., 188, Note, 189; State v. Bond, 4 Jones Law (N. Car.), 9; Am. & Eng. Ency. Law, vol. 23, p. 218; Endlich on Const. of Stat., sec. 499.)
14. If the L. & N. amendment had been worded to take effect from its passage, January 17, and before the general reservation act of February 14, 1856, it was not accepted until the general reservation act had come into force, (if ever accepted at all.) Until accepted, it was a mere proposition and not a contract, and if accepted afterwards, it was under the general reservation act, and therefore subject to repeal. (Cincinnati R. v. Clifford, 113 Ind., 460; Cooley's Const. Lim., 6 Ed., 335. Note; St. Louis R. v. Berry, 113 U. S., 475, 476; Memphis v. Little Rock R., 112 U. S., 622; Botts v. Turnpike Co., 88 Ky., 54.)
15. If the L. & N. had power to purchase competing lines, it could

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- only purchase those willing, and legally able, to sell, or be sold, to it; and the C., O. & S. W. was, by its charter and the constitution, distinctly prohibited from selling or being sold to a competing line. (Ky. Acts 1881, vol. 1, page 262, sec. 9; Cent. Co. v. Pullman Co., 139 U. S., 54; St. Louis R. v. Terre Haute R., 145 U. S., 404; Pa. R. v. St. Louis R., 118 U. S. 290; Gibbs v. Con. Gas Co., 130 U. S., 410; East Line R. v. Rushing, 69 Tex., 313; East Line R. v. State, 75 Tex., 434; Thompson's Commentaries on Corporations, sec. 5880.)
16. The constitutional prohibition against the C., O. & S. W. selling or being sold to its rival and competitor, forbade the L. & N. buying it in at a "judicial" sale. (Elkins v. Camden R., 36 N. J. Eq., 12.)
 17. If the L. & N. were to buy in the C., O. & S. W. at a judicial sale, it could only be to stop its operation; for the constitution expressly forbids it from "operating" a competing line. (Constitution, sec. 201.)
 18. The other L. & N. amendment relied on (of 1854), authorizing it to "unite" its road (then in construction, and only thirty-one miles long) with "connecting" roads, did not authorize it to purchase, a generation afterwards, unconnecting, competing lines. (St. Louis R. v. Terre Haute R., 145 U. S., 405; Pa. R. v. St. L. R., 118 U. S., 311; Board v. R., 50 Ind., 85; Atchison v. R., 110 U. S., 668; Cent. Co. v. Pullman Co., 139 U. S., 24; Oregon R. v. Oregonian R., 130 U. S., 30; State v. Vanderbilt, 37 Ohio St., 599; Hancock v. L. & N. R., 145 U. S., 412.)
 19. Neither the L. & N. amendment of 1856 nor that of 1854 is shown to have been accepted by that unanimous vote of every stockholder which was necessary, if they were intended to change the scope of the enterprise by allowing it to buy and operate competing roads, anywhere and everywhere. Therefore, no such purchase could be justified under them. (Morawetz on Corporations, 2d Ed., sec. 397, 399, 645, 1047, 1059; Pearce v. R., 21 How., 441; Botts v. Turnpike Co., 88 Ky., 54.)
 20. The attempted purchase by the L. & N. of "the controlling majority of the stock and bonds" of the C., O. & S. W. competing system, was not only illegal at common law, but was a violation of the constitutional prohibition against one road "consolidating stock," or acquiring by purchase or "otherwise" a competing line or "operating" the same. (Pa. R. v. Comm., 29 Eng. & Am. R. Cas., 145, 151 (7 Atl., 368, 374); Pearson v. Concord R., 13 Am. St. R., 603 (62 N. H., 537); Cent. R. V. Collins, 40 Ga., 582; 43 Ga., 57; People v. Gas Trust, 17 Am. St. Rep., 330; Memphis R. v.

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Woods, 16 Am. St. Rep., 88; Cook on Stockholders, 3d Ed., sec. 64, 315; *Elkins v. Camden*, 36 N. J. Eq., 12.)

21. If the L. & N. had the power to buy and operate competing lines in 1856, the constitution of 1891, exercising the police power of the State, and on grounds of public policy, forbade it, thereafter. Railroads, being but the State's highways, operated by corporations as the agents of the State, and performing a public function and duty of the State, "their construction and management belong primarily to the Commonwealth" (104 U. S., 135). And their property is "affected with the public use, and to the extent of that use is subject to legislative regulation;" and "so long as it maintains the use it must submit to the control," (142 U.S., 393); as the State could regulate these highways if it were operating them itself through its more immediate agents and officers. (*Olcott v. Supervisors*, 16 Wall., 694; *Chicago R. v. Burlington R.*, 34 F. R., 481; *Sharpless v. Philadelphia*, 59 Am. Dec., 774; *N. Y. R. v. Bristol*, 151 U. S., 571; *Charlotte R. v. Gibbs*, 142 U. S., 393; *Grainger Cases*, 94 U. S., 126; *People v. R.*, 70 N. Y., 569; *Chicago R. v. Minnesota*, 134 U. S., 454; *Ga. Bank. Co. v. Smith*, 128 U. S., 179, 181; *Stone v. Farmers' Loan Co.*, 116 U. S., 324; *Pa. R. v. Miller*, 132 U. S., 75.)
22. It was likewise a valid exercise of the police power of the State, to declare what contracts of purchase and sale, and what biddings at judicial sales, are against public policy, and shall be unlawful. Such laws are often passed, and are binding alike upon corporations and individuals; irrespective of what were, before, the natural powers of the individual, or the conferred powers of the corporation, to make such contracts. (*Morawetz on Corporations*, 2d Ed., sec. 1061, 1062; *Phipps v. Harding*, 70 F. R., 468; *Beer Co. v. Mass.*, 97 U. S., 33; *Crowley v. Christiansen*, 137 U. S., 90.)
23. It was likewise a valid exercise of the police power of the State to thus guard the "public health, morals and safety" from the increased dangers incident to the inefficient, unprogressive and negligent manner in which railroads, unspurred by competition, are proverbially managed; and to prevent an increase, among employes and passengers, of the killed and wounded, already amounting, in the United States, to over 35,000 per year. (*Annual Report of the Inter-State Commerce Commission for 1894*, page 74; *Schoolcraft v. L. & N.R.Co.*, 92 Ky., 240; *Anderson v. Jett*, 89 Ky., 378; *Butchers' Union v. Slaughter House Co.*, 111 U. S., 746; *N. O. Gas Co. v. La. Gas Light Co.*, 115 U. S., 672; *Hancock v. L. & N.*, 145 U. S., 412; *Charles River Bridge case*, 11 Peters, 548; *Eagle Ins. Co. v. Ohio*, 153 U. S., 455; *Plympton v. Mass.*,

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155 U. S., 471, 479; N. Y. R. v. Bristol, 151 U. S., 571; Cent. R. v. Collins, 40 Ga., 482; Solan v. Chicago R., 63 N. W. Rep., 693.)

24. The contention by the L. & N. that the Kentucky constitutional provision is a partial repeal by the State of the grant to the L. & N. of power to purchase competing railroads; and that it is void because of the clause of the United States constitution that "congress shall have power to regulate commerce among the States," is a *felo de se*; for, if the repeal of the L. & N. amendment of 1856 violates the inter-state commerce clause, the original enactment of that amendment, in 1856, was likewise void, for the same reason. If the inter-state commerce clause permitted a grant to the L. & N. of power to destroy competition, it will permit a repeal of the grant. The grant was a burden on commerce; the repeal relieves it.
25. But it is not a regulation of inter-state commerce for a State to forbid its railroads to purchase and operate competing lines. It is simply an exercise of the police power, to fix the powers and duties of its corporations. It regulates the corporations, and not the commerce that they carry. It is "not directed against commerce, and only affects it incidentally." (128 U. S., 96.) The power to authorize or prohibit consolidations, or the formation of monopolies, by the purchase and sale of competing railroads, is a matter that is not within the power of congress at all; and, if it is within the power of congress, yet, until congress sees fit to exercise the power, the State may act. (*In re Green*, 52 F. R., 104; *U. S. v. E. C. McKnight Co.*, 156 U. S., 11; *Hancock v. L. & N. R.*, 145 U. S., 412; *Covington & Cincinnati Bridge Co. v. Ky.*, 154 U. S., 209; *Plumley v. Mass.*, 155 U. S., 462, 471; *Brennan v. Titusville*, 153 U. S., 202; *Leavenworth v. Chicago R.*, 134 U. S., 688; *Ashley v. Ryan*, 153 U. S., 436; *Wallace v. Loomis*, 97 U. S., 154; *New Buffalo v. Iron Co.*, 105 U. S., 73; *Livingston Co. v. Portsmouth*, 138 U. S., 213; *Charlotte R. v. Gibbs*, 142 U. S., 393; *Smith v. Alabama*, 124 U. S., 465; *R. Com. Case*, 116 U. S., 333; *Crutcher v. Commissioners*, 141 U. S., 47; *Gulf R. v. State*, 13 Am. St. R., 815; *Solan v. Chicago R.*, 63 N. W., 593.)
26. This prohibition is contained in the constitution of sixteen States, to-wit: Pennsylvania, Nebraska, Texas, Georgia, Missouri, Illinois, Michigan, North Dakota, South Dakota, Washington, Colorado, Montana, Arkansas, West Virginia, Wyoming, Kentucky; and in the statutes of about as many more. In the numerous decisions rendered by the Federal and State courts upon these constitutional and statutory provisions, no judge has ever raised a doubt of the power of the State, or suggested that the inter-State commerce clause has anything to do with it. (*Gulf R. v. State*,

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13 Am. St. R., 815 (72 Tex., 404); VonSteuben v. Cent. R., 4 Pa. Dist. Reports, 153; Atchison R. v. State; 8 Am. St. R., 164 (24 Neb., 143); Stockton v. Cent. R., 50 N. J. Eq., 52, 489; East Line v. Rushing, 69 Tex., 306; East Line v. State, 75 Tex., 446; Pa. R. v. Commonwealth, 29 Am. & Eng. R. Cas., 145, 151 (7 Atl., 368, 374); Cent. R. v. Collins, 40 Ga., 629; 43 Ga., 57; Langdon v. Branch, 37 F. R., 458; Hamilton v. Savannah R., 49 F. R., 412; Clark v. Cent. R., 50 F. R., 338; Kimball v. Atchison R., 46 F. R., 888; Leavenworth v. Chicago R., 144 U. S., 699; State v. Vanderbilt, 37 O. St., 590; Currier v. Concord R., 48 N. H., 325; Thouron v. E., T., V. & G. R., 39 Am. & Eng. R. Cases, 198 Cook on Stockholders, 3 Ed., page 1500, note; Memphis R. v. Woods, 16 Am. St. Rep., 81 (88 Ala., 643); Solan v. Chicago R., 63 N. W., 693; Tex. Pac. v. Southern Pac., 17 Am. St. Rep., 445 (41 La. Ann., 970.)

27. The remedy of the State, to prevent this violation of the constitution, and the creation of a public nuisance by this purpresture, was by injunction. (State v. Saline Co., 11 Am. Rep., 454 (51 Mo., 350); Attorney General v. R., 35 Wis., 534; Stockton v. Cent. R., 50 N. J. Eq., 52, 489; State v. Wheeling Bridge Co., 13 How., 518; Pa. R. v. Commonwealth, 29 Am. & Eng. R. Cas., 145, 151; State v. Gulf R., 13 Am. St. Rep., 815; Langdon v. Branch, 37 F. R., 449; Hamilton v. Savannah R., 49 F. R., 412; U. S. v. West. Union, 50 F. R., 42; Kansas v. Mugler, 123 U. S., 673; Spelling on Extraordinary Relief, sec. 922; High on Injunctions, 3 Ed., sec. 1304; Attorney General v. Mid Kent R., Law Reports, 3 Ch. App., 103; Attorney General v. Gt. Northern, 1 Drewry & Smale, 154; Attorney General v. Gt. Eastern R., Law Reports, 11 Ch. Div., 482.)

WM. J. HENDRICK, ATTORNEY GENERAL, AND FRANK PARSONS,
COMMONWEALTH'S ATTORNEY, OF COUNSEL ON SAME SIDE.

JUDGE LEWIS DELIVERED THE OPINION OF THE COURT.

The Commonwealth of Kentucky brought this action December 11, 1893, against Louisville & Nashville Railroad Company, Chesapeake, Ohio & Southwestern Railroad Company, Ohio Valley Railroad Company, Owensboro, Falls of Rough & Green River Railroad Company, Short Route Railway Transfer Company, and Paducah Union Depot Company, all corporations created by statute of this State, for an injunction, nature and extent of which is shown by the

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judgment rendered in pursuance of prayer of plaintiff's petition and now appealed from, in substance, as follows:

1. That Louisville & Nashville Company be perpetually enjoined from acquiring or assuming possession or control of the properties or franchises of either of the other companies made defendants, or of Elizabethtown & Hodgenville Railroad Company, or of the Union Depot at Seventh and Water streets, in Louisville. 2. That Louisville & Nashville Company be perpetually enjoined from bidding for or purchasing at any judicial sale or otherwise, the properties or franchises of either company mentioned in first paragraph, or being interested in such bid or purchase, or being *cestui que trust* of any trustee who may purchase or acquire same. 3. That Louisville & Nashville Railroad Company be perpetually enjoined from carrying out any contract between it and Illinois Central Railroad Company, dated November 28, 1893, copy of which is made part of the record; or purchasing, paying for or using any stocks, securities, interest in real estate or items of indebtedness mentioned in that contract, for the purpose of acquiring either sole or joint control or management of the properties or franchises of either company mentioned, or of the depot at Seventh and Water streets in Louisville. 4. Each of the other companies made defendant is perpetually enjoined allowing any of its stock to be voted or controlled by Louisville & Nashville Company, directly or by trustee or other person holding for its benefit; or any way combining or agreeing with that company, it may interfere with independent control or operation of the property of either of said companies; the judgment being that Louisville & Nashville Company can not lawfully hold or own stock of any of said companies. 5. That the judgment in tenor and effect embraces not only

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the several corporations made defendants, but also directors, officers and agents of each.

It is stated, substantially, in plaintiff's petition, as cause of action, that Louisville & Nashville Company owns and controls many railroads in this State, as respects which, railroads owned or controlled by the other companies named are parallel and competing. Yet, that defendants have made a contract and arrangement whereby Louisville & Nashville Company is about to, and unless enjoined will, become owner and acquire possession and control of capital stock, franchises and properties of the other companies to the great and irreparable injury of plaintiffs, and in violation of section 201 of the constitution of this State as follows: "No railroad, telegraph, telephone, bridge or common carrier company shall consolidate its capital stock, franchises or property, or pool its earnings, in whole or in part, with any other railroad, telegraph, telephone, bridge or common carrier company owning a *parallel or competing line or structure*, or acquire by purchase, lease or otherwise, *any parallel or competing line or structure or operate the same*; nor shall any railroad company or other common carrier combine or make any contracts with the owners of any vessel that leaves or makes port in this State, or with any common carrier, by which combination or contract the earnings of one doing the carrying are to be shared by the other not doing the carrying."

In an amended petition it is stated, in substance, that Louisville & Nashville Company was endeavoring to acquire capital stock and interest in real property of and mortgage securities against the other companies, defendants, so as to obtain control and ultimately purchase at judicial sale and become owner of their franchises and property.

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Although that allegation was, in the form made, denied, the answer contained the affirmative statement that the purchase of stocks and securities referred to had already been consummated, and it was in effect admitted that Louisville & Nashville Company intended to purchase the franchises and properties at judicial sale. Besides, it appears that November 27, 1893, C. P. Huntington and Newport News & Mississippi Valley Company, owning and controlling interest in the capital stock and real estate of and holding a large amount of outstanding mortgage bonds against those companies, made to Illinois Central Railroad Company a deed therefor, which the latter, November 28, 1893, sold to Louisville & Nashville Company, reserving right to joint use of that portion of Chesapeake, Ohio & Southwestern main line between Paducah and Memphis. And that in the month of December, 1893 and January, 1894, very soon after these transactions, suits were filed in the United States Circuit Court against all the debtor companies to foreclose mortgages and subject their franchises and property to sale, the roads being in the meantime placed in hands of receivers, shows Louisville & Nashville Company made the contract for the purpose and to enable it to bid for and buy them at judicial sales, which we are satisfied it combined with others to bring about.

Section 201, in plain terms, makes it unlawful for any two or more railroad companies owning parallel or competing lines or structures to consolidate their capital stock, franchises or property, or to pool their earnings in whole or in part, or for one of them to acquire by purchase or lease property or franchises of the other, it matters not whether the purchase be made at a voluntary or judicial sale, it being the manifest purpose to inhibit one such company acquiring, controlling or operating the road of another in any

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manner or to any extent whatever. And to foster competition and effectually forestall and prevent monopoly in the business of railroad transportation, framers of the constitution made that inhibition applicable not merely to the case of competing, but as well to that of parallel lines, which, though not always competing lines, might become so by construction of a branch of one to a point on the other. For obviously the word "parallel" was not used according to its strictly accurate meaning of two railroads constructed equidistant apart throughout the whole extent, which would be impracticable, but in the sense of two conforming in their general direction.

The Louisville & Nashville Company was chartered about 1850, and constructed a road from Louisville by way of Elizabethtown and Bowling Green, Kentucky, to Nashville, Tennessee, which was completed about 1859, and still is one of the main or trunk lines of the vast system since acquired by that company. About the same time was constructed a branch road from a point about seven miles south of Bowling Green, to the State line, that has been since extended and is now owned and operated by it to Memphis, Tennessee. Subsequently, it purchased and now owns a road called Evansville, Henderson & Nashville railroad, that extends from Edgeville, Tennessee, on its main line, ten miles north of Nashville by way of Hopkinsville, Kentucky, to Henderson, thence across Ohio river to Evansville, Indiana, and to St. Louis, Missouri. Still later it purchased and now owns what is called Owensboro, Russellville & Nashville Railroad, completed and in operation, not wholly, but from Owensboro to Adairsville, south of Russellville. It also owns and operates various branches in this State that diverge from the main line eastwardly, as well as Kentucky Central road extending from Cincinnati southward and

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branches thereof; but those parts of the system relate to questions in this case only incidentally.

Of roads constituting what may be properly called the Chesapeake, Ohio & Southwestern system, because owned or controlled by the corporation of that name, the first one built extends from Paducah, Kentucky, to Elizabethtown, and for several years the company owning it was dependent for transportation of its passengers and freight, between Elizabethtown and Louisville, upon the Louisville & Nashville road. But another road was finally built from Louisville to Cecilia Junction, six miles northwest of Elizabethtown, the city of Louisville subscribing and paying one million dollars for that purpose, whereby was secured a continuous line therefrom to Paducah, independent of the Louisville & Nashville road. It is, however, proper to state the entire line was afterwards sold under judgment of the district court of the United States, and that part between Louisville and Cecilia Junction purchased from bidders at that sale by the Louisville & Nashville Company. But by a subsequent lease, amounting practically to purchase of it, acquisition of the road from Elizabethtown to Paducah and acquisition of a road from Paducah to Memphis, the Chesapeake, Ohio & Southwestern Company became, about 1881, owner of a connected, continuous and independent railroad from Louisville by way of Cecilia Junction and Paducah to Memphis.

It has controlling interest in and controls the following railroads, although each still bears the name and is nominally held by the company that built it: 1. Ohio Valley road that extends from a point on the Ohio River, opposite Evansville, Indiana, by way of Henderson and Princeton, Kentucky, where it crosses main line of Chesapeake, Ohio & Southwestern, to Hopkinsville. 2. Owensboro, Falls of

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Rough & Green River Road that extends from Owensboro to Horse Branch, where it connects with said main line. 3. Elizabethtown & Hodgenville road, which is practically an extension of what has become a branch of said main line extending from Cecilia Junction to Elizabethtown. 4. Short Route Railway, extending from Preston street in Louisville, through the depot at Seventh and Water streets to Twelfth, where it connects with said main line.

It is thus made apparent that if Louisville & Nashville Company be permitted to purchase the railroads and adjuncts mentioned, it will at once become owner and have control of: First, the Union Depot at Seventh and Water streets, a competitor of its own at Tenth and Broadway streets, and thereby acquire, virtually, a monopoly of depot privileges in Louisville. Second, main line of Chesapeake, Ohio & Southwestern system, extending from Louisville, by way of Cecilia Junction and Paducah, a distance of three hundred and ninety-two miles, to Memphis, which, in meaning of section 201 of the constitution, is a line parallel to its own line, extending from Louisville, by way of Elizabethtown and Bowling Green, a distance of three hundred and seventy-seven miles, to Memphis, and thereby would be stifled and destroyed active competition for railroad business not only to and from the two terminal points, but also for that originating and done wholly within limits of this State that does, and as long as the two roads are owned by distinct corporations will continue to, exist for the public good, except where earnings are, in violation of the constitution, pooled. Third, Ohio Valley Road, lying wholly within limits of this State and that competes with Evansville, Henderson and Nashville road for business between Hopkinsville and Evansville and intermediate points. Fourth, Owensboro, Falls of Rough

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& Green River road, built and operated wholly in this State, and that competes with Owensboro & Russellville road, between Owensboro and Central City, where the latter crosses main line of Chesapeake, Ohio & Southwestern system. Fifth, Elizabethtown & Hodgenville road, built and operated wholly within this State, and that, connected as it is with the road from Cecilia Junction to Elizabethtown and said main line, competes with Louisville & Nashville main line between Hodgenville, ten miles east of it, and Louisville, and also between Elizabethtown and Louisville. In fact, if that purchase is made, Louisville & Nashville Company will own and operate, without competition, every road, with one exception, within that part of this State, bounded by Ohio river, its own main line, Tennessee line, and that portion of Chesapeake, Ohio & Southwestern main line, extending from Paducah southward, including the entire western coal fields. The exception referred to is Louisville, St. Louis & Texas road, which, if the alleged scheme is carried out, will probably become also a part of the Louisville & Nashville system; for it is completed from Henderson only to Salt River, and, consequently, dependent upon Chesapeake, Ohio & Southwestern Company, as it will, in the event mentioned, be dependent upon Louisville & Nashville Company for access to Louisville.

The effect of acquisition by Louisville & Nashville Company of these roads, will be absorption of an entire system of parallel and competing lines between four hundred and six hundred miles in length, and substitution of a monopoly of railroad transportation. And in view of the enormous sum of \$4,500,000 paid, or agreed to be paid, by Louisville & Nashville Company for the capital stock of the other companies, being major part thereof, and for the mortgage securities mentioned, it would be idle to say it does not in-

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tend, having the power, to take possession and control, and ultimately purchase and own, the whole franchises and properties.

We need not say more in regard to the transaction than that, if consummated, an express provision of the constitution would be violated, and great injury to the public be done. The judgment in this case must therefore be affirmed, unless the grounds of defense are sufficient to defeat the action.

1. It is contended injunction is not the proper remedy. But it seems to us if the Commonwealth of Kentucky can sue at all for an act of *ultra vires* by a corporation, there is no room for disputing its right to a preventive injunction in this case. For, according to very respectable authority, and, we think, upon principle, a court of equity has jurisdiction, and may, in an action by the State, enjoin a corporation from exceeding its chartered powers or doing acts otherwise illegal and injurious to the public. (Pomeroy's Equity Jurisprudence, sec. 1093; Thomas v. West Jersey R. Co., 101 U. S., 71; Coosaw Mining Co. v. South Carolina, 144, U. S., 564; Langdon v. Branch, 37 Fed. Rep., 449; Stockton v. Central R. Co., 50 N. J., 52; Attorney-General v. Railroad Co., 35 Wis., 524.)

As said in the last case, it may better serve the public interest to restrain a corporation than to proceed by indictment or by ordinary action to forfeit its charter. In this action, however, the relief is asked upon equitable grounds that the remedy at law is not plain and adequate, and that vexatious litigation will be prevented.

Under section 480, Civil Code, an action ordinary may be brought to vacate or repeal charters. But when this action was commenced Louisville & Nashville Company had not done anything in relation to the matter of litigation, for

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which a proceeding under that section would lie. It had not yet committed the act of purchasing and acquiring title to the parallel and competing lines in question; nor the act, equally unlawful, of taking possession of and controlling these roads, which purchase of capital stock gave it power to do. It had simply put itself in a position enabling and showing beyond question it was about to commit the alleged unlawful acts.

The Commonwealth had then either to bring this action or await commission of one of the acts mentioned, and then commence tedious and vexatious litigation, under section 480, with Louisville & Nashville Company in full possession of the roads in question, and probably armed with a deed as purchaser of the franchises and properties at a judicial sale.

It is too plain for further discussion the Commonwealth had the right to bring this action.

2. It is contended that by section 3 of a statute of this State, approved January 17, 1856, right was given to Louisville & Nashville Company to purchase and hold any and all railroads that then were, or might ever be, constructed within limits of Kentucky, whether parallel and competing lines or not; and that in virtue of section 10, article 1, of the Constitution of the United States, providing "no State shall pass any law impairing the obligation of contracts," the right still exists, and may be exercised without hindrance or limit, notwithstanding both the State Constitution and public policy forbid. That section reads as follows: "That said company may, under provisions of the 13th section of this act, from time to time, extend any branch road *and may purchase and hold any road constructed by another company or may agree on terms to receive the cars of other*

roads on their said roads, but shall charge for the same the usual freight."

When the language of a statute is clear, unequivocal and capable of but one meaning, there is no room for construction, nor choice for a court but to enforce it as written. But when looking to the subject-matter and object of a statute, intention of a legislature can be collected, words may be modified, altered or supplied so as to obviate any repugnancy or inconsistency with such intention. (Sutherland on Construction of Statutes, sec. 218.) And "all words, if they be general and not express and precise, are to be restricted to the fitness of the matter. They are to be construed as particular, if the intention be particular; that is, they must be understood as used in reference to the subject-matter in the mind of the legislature, and strictly limited to it." Endlich on Interpretation of Statutes, sec. 86.)

Louisville & Nashville Company was authorized by its charter to construct a railroad from Louisville to the State line in direction of Nashville, but, without authority of Tennessee Legislature, subsequently given, could not have continued it farther.

Counsel refer us to an amendment of the charter passed by the legislature of this State in 1854, making it lawful for the company to "unite their said road with any other road connecting therewith." But as it does not appear to have been re-enacted by the legislature of Tennessee, nor to give authority to purchase or hold parallel or competing lines, we need not consider it. It was, however, followed by a statute of Tennessee, containing sixteen sections, and embodied in the statute of January 17, 1856, mentioned and described in first section thereof as follows: "That an act passed by the legislature of Tennessee, at the session of 1855, entitled an act to charter the Louisville & Nashville

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Railroad Company and the several acts amendatory of said act, passed by the legislatures of Kentucky and Tennessee, be and the same is re-enacted in the State of Kentucky, in the following sections and words." Then come the sixteen sections in which are provisions for issuing bonds of the State of Tennessee to aid Louisville & Nashville Company to build a bridge across Cumberland River and to purchase railroad iron; also in regard to subscriptions to capital stock of the company by counties of that State; sec. 13 being as follows: "Provided nothing herein contained shall be construed to prevent Louisville & Nashville Railroad Company from admitting *branch roads to connect with it at any point or points to be agreed upon between said company, and those who have or may subscribe stock for the construction of any branch road. . . .* And said company is hereby vested with the power to issue its bonds under provisions of this act to obtain means to construct and equip any branch road, the bonds to express on their face the purpose for which they were executed; and to secure their payment may execute a deed of trust or mortgage, for payment of which the rights, credits, property and franchise procured for said branch by use of its means shall alone be liable. The credit, rights and profits of the main stem shall not be used to create means to construct, or make liable for any debt or liability created to construct branch roads, etc."

It will be observed that the subject matter of sec. 13 of the Tennessee statute is *branch roads* that Louisville & Nashville Company was thereby authorized to *admit to connect* with the main stem; but as State aid was to be furnished by Tennessee for building it, there was a special provision it should not be incumbered with cost of constructing such branch roads.

The subject matter in mind of the legislature of Kentucky

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when enacting section 3 of the statute of January 17, 1856, was likewise *branch roads*, it being there provided that said company might, from time to time, *extend any branch road*. And as the words of that section immediately following which it is contended confer the right claimed, viz.: "And may purchase and hold any road constructed by another company," are general and not express and precise, they should, according to the rule of construction referred to, being simply a rule of common sense and common fairness, be restricted to the fitness of the matter. And that such was intention of the legislature is plainly shown by the words, next following, "or may agree on terms to receive the cars of other roads on their said road;" for a beneficial interchange of cars could and would be reasonably expected to take place between a main line and connecting branch, or even between two roads that meet and form a continuous line; but not between two parallel or competing lines. Exercise of the power conferred upon Louisville & Nashville Company to admit branch roads to connect with the main stem, or to extend branch roads, which was intended to mean practically the same, was, at date of the statute of January 17, 1856, as now, regarded as beneficial to the public, and construction of one or more by local aid as not improbable, for both the Memphis and Lebanon branches were constructed not long after completion of the main road to Nashville. But the power to purchase and hold parallel and competing lines was manifestly not asked nor intended to be given. For, instead of seeking legislative authority to purchase such roads Louisville & Nashville Company was at that time without adequate means to complete its own. Though the company had in 1856 been organized five years only thirty-one of one hundred and eighty miles of its road was then made, and it could not have been completed without incum-

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bering it with mortgage debts, and was not until about nine years after the charter was granted.

That the legislature then regarded it contrary to the public good and did not intend to give the power in question is made further manifest by "An act to authorize railroad companies to make certain contracts with each other," approved January 22, 1858, which provides that all railroad companies in this State shall have power and authority to make with each other, contracts of the following character:

1. For the consolidation of either the management, profits or stock of any two or more companies, the roads of which are or shall be so connected as to form a continuous road.
2. For leasing of the road of one company to another; provided the roads so leased shall be so connected as to form a continuous line.

The construction of that act was involved in the case of *Hancock v. Louisville & Nashville Railroad Company*, 145 U. S., 409, the Supreme Court using this language: "The evil which was intended to be guarded against by this limitation was the *placing of parallel and competing lines under one management*, and the control by one company of the general railroad affairs of the State through the leasing of roads remote from its own, and with which it has no physical or direct business connection.

Though thirty-eight years since the passage of the act of 1856 and thirty-six years since the act of 1858 had elapsed when this action was commenced, Louisville & Nashville Company never before claimed or attempted to exercise the right to purchase and hold parallel and competing lines, except about 1878, when it purchased the road from Louisville to Cecilia Junction, which was held only a short time and then sold to Chesapeake, Ohio & Southwestern Company.

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To construe the statute as counsel urge, we must disregard the established rule that franchises and privileges not in clear and express terms granted are to be taken as withheld, assume the legislature granted the extraordinary and dangerous privilege in intentional disregard of public policy, and that it deliberately betrayed the State of Tennessee, which had given State aid to Louisville & Nashville Company, when it was not, and upon faith it would never be, invested with power so detrimental to its own interest and that of its citizens.

But there is an obstacle to the proposed purchase, even if Louisville & Nashville Company had statutory power. The charter of Chesapeake, Ohio & Southwestern Company prohibits consolidation of its capital stock with that of any company whose lines are parallel and competing, as those of Louisville & Nashville Company are. And for the latter to purchase and hold the road of the former would be as much an unlawful act as if done in violation of an express provision of its own charter.

But it is contended the question of right involved in this case is controlled by that clause of the constitution of the United States which provides that "congress shall have power to regulate commerce arising among the States." The power of a State by proper enactments to foster competition and prevent monopoly within its own limits of the business of railroad transportation, has never been made a question in the Supreme Court of the United States, notwithstanding nearly two-thirds of the States have, and for years have had, provisions on the subject of the same character, and quite as stringent and comprehensive as that of section 201. Moreover, in several of them, the validity of such provision has been directly adjudicated and sustained. That there should be such consensus of opinion and hitherto

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no dispute of the right and necessity for State enactments on the subject is persuasive of their validity and at same time convincing of their necessity.

In our opinion they are not in a proper sense regulations of interstate commerce, nor does their enforcement infringe upon the power of congress to regulate commerce between the States. Whether Louisville & Nashville Company does or not acquire the roads in question, will not affect traffic or business on those roads that are now in operation and will continue so irrespective of its right to purchase and hold them, that the legislature of this State only can give.

The purpose and effect of section 201 is simply to prohibit, because against public policy, the acquisition and control of those roads by any company that will use and operate them so as to hurt the public.

It was not intended to regulate the commerce of which these roads are mere vehicles, nor to prescribe rules by which that commerce is to be carried on.

Judgment affirmed.

CASE 95—PETITION ORDINARY—JUNE 14.

**Trustees of Common School District v. City
of Flemingsburg.**

APPEAL FROM FLEMING CIRCUIT COURT.

1. **BOND FOR COSTS.**—Sec. 616 of the Civil Code of Practice, which requires a plaintiff who is a corporation to give bond for costs, applies to private corporations alone and not to public corporations, and, therefore, does not apply to the trustees of a common school district.
2. **CONSTRUCTION OF STATUTES.**—Statutes are sometimes extended to

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cases not within the letter of them and cases are sometimes excluded from the operation of statutes though within the letter, it being an acknowledged rule in the construction of statutes that the intention of the makers ought to be regarded.

JOHN S. POWER AND CARROLL POWER FOR APPELLANTS.

1. Sec. 616 of the Civil Code which requires non-residents and corporations other than banks, created under the laws of this State, to give security for costs as provided in that section, does not embrace *quasi* political corporations such as school districts. (*Harris v. School District No. 8*, 28 Foster, 58-61; 31 Georgia, 225; 68 Ill., 154; 11 Kans., 28-30; Dillon on Municipal Corporations, vol. 1, secs. 22-25; *City of Louisville v. Commonwealth*, 1 Duvall, 295.)
2. The reason for requiring private corporations to give bond for costs, being to guard against such corporations defeating the collection of costs recovered against them by dissolution, bankruptcy, &c., does not hold good against *quasi* political corporations and does not apply to them.
3. The fact that sec. 4437 of the Kentucky statutes makes the trustees of a school district a body politic and corporate does not bring such district within the purview of the code provision. (*Graham v. Mt. Sterling Coal Road Co.*, 14 Bush, 425; *Devine v. Harvie*, 7 Monroe, 440; *Tracy & Loyd v. Hornbuckle*, 8 Bush, 336; *Loring v. Small*, 5 Iowa, 271; *Board of Education v. Nedinberger*, 78 Ill., 58; *Bulkley v. Eckert*, 45 Amer. Dec., 650; *Mayor of Baltimore v. Root*, 63 Amer. Dec., 692.)
4. Statutes are sometimes extended to cases not within the letter of them, and cases are sometimes excluded from the operation of statutes though within the letter, since in the construction of statutes the intention of the maker ought to be regarded. (*State v. Boyd*, 2 Gill. & J., 274; *Hawthorne v. St. Louis*, 11 Mo., 59; *Dwarris on Statutes*, 9 Law Library, 63.)

W. G. DEARING, J. P. MCCARTNEY AND G. W. CASSIDY FOR APPELLEE.

1. The appellant school trustees were made and created a corporation and body politic by the terms of the act creating the school district and are subject to all the incidents of corporations. (General statutes, page 1166, sec. 4.)
2. Sec. 616 of the Civil Code, which applies to all corporations except banks created under the laws of this State, embraces the appellant school trustees.

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JUDGE PAYNTER DELIVERED THE OPINION OF THE COURT.

The trustees of Common School District No. 1, colored, Fleming county, instituted this action against the City of Flemingsburg to recover an amount alleged to be due the common school district. A rule was awarded against the plaintiffs to show cause why a bond for costs should not be given. Plaintiffs refusing to give the bond the petition was dismissed. From that judgment of the court this appeal is prosecuted.

By the common school law the trustees of a common school district and their successors are a "body-politic and corporate," with perpetual succession by the name of the trustees for their school district, and as such can sue and be sued, etc.

Sec. 616, Civil Code of Practice, reads as follows: "A plaintiff who is a non-resident of this State, or a corporation other than a bank, created by the laws of this State, before commencing an action, shall file in the clerk's office a bond of a sufficient surety; to be approved by the clerk, for the payment of all costs which may accrue in the action in the court in which it is brought, or in any other to which it may be carried either to the defendant or to the officers of the courts."

It is contended that by the foregoing section of the Code, it was the duty of the plaintiffs to execute the bond for costs, and upon their failure to do so it was the duty of the court to dismiss the petition.

A school district is a *quasi* corporation, so constituted for a public purpose. It is one of the agencies employed by the State to administer the common school laws. To make it an effectual and permanent aid the trustees have perpetual succession, and their duties are entirely of a public character. They can contract no debts nor can they make

disposition of any of the property of the school district, except by express authority of law. They can not become insolvent or dispose of the property of the district to prevent the payment of its debts.

Mr. Dillon in his work on Municipal Corporations, vol. 1, sec. 25, in speaking of school and road districts says: "They are involuntary political or civil divisions of the State, created by general laws to aid in the administration of the government. . . . They are purely auxiliaries of the State . . . Considered with respect to the limited number of their corporate powers the bodies above named rank low down in the scale of corporate existence, and hence have been frequently termed *quasi* corporations."

States, counties, towns, and cities are corporations—they are political powers. School districts are of somewhat similar character. All these *quasi* corporations are constituent elements of one total sovereignty. (*City of Louisville v. Commonwealth*, 1 Duv., 297.)

Banks, railroad companies, turnpike companies, etc., are private corporations.

While it is true the section does not make any distinction between public and private corporations, and does not except public corporations from its operation, yet in the construction of statutes it is proper to consider the policy of the law, and, if possible, reach the legislative intent. We think the policy of the section of the code in question was to protect persons when private corporations should bring suits against loss in the event of a failure of the corporation to recover a judgment. The legislature had in mind that the corporation could become insolvent, be disorganized, and in various ways render it impossible for the successful litigant to be recompensed for the sums expended in defending the litigation. Banks were excepted because they usually

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have the cash with which to pay any expense incurred in a litigation.

We are of the opinion that the provisions of the code above refer to private corporations. It could not be said that it was intended that the State, a county or city should be required to give bond for costs, nor can it be reasonably presumed that a school district should be required to do so.

"Statutes are sometimes extended to cases not within the letter of them, and cases are sometimes excluded from the operation of statutes, though within the letter, on the principle that what is within the intention of the makers of a statute is within the statute, though not within the letter; and that which is within the letter of a statute, but not within the intention of the makers, is not within the statute; it being an acknowledged rule in the construction of statutes that the intention of the makers ought to be regarded," (Mayor &c., of Baltimore v. Root, 8 Md., 95.)

We are of the opinion that the court erred in holding that plaintiffs should give bond for costs, and in dismissing their petition for their failure to do so.

Judgment reversed, with directions to set aside order dismissing the petition, and for further proceedings consistent with this opinion.

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CASE 96—PETITION EQUITY—JUNE 14.

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97	707
115	174

APPEAL FROM PAYETTE CIRCUIT COURT

1. **TIME OF ELECTION OF OFFICERS OF TOWNS AND CITIES.**—The provision of sec. 160 of the constitution that the term of elective officers of towns and cities other than members of legislative boards "shall be four years" was not intended to apply to officers that might be elected under the then existing charters of towns and cities, but was intended to control the General Assembly when it should come to provide by general laws for the government of towns and cities under the new constitution.
2. **SAME.**—As no general law for the government of cities of the second class had been passed by the General Assembly at the time of the general election in November, 1893, officers of such cities then elected were elected under the old charters, which, except as to the time of election of city officers, were continued in force by sec. 166 of the constitution until the General Assembly should provide by general laws for the government of towns and cities. Therefore such officers were not entitled to hold for a term of four years or for any definite time, but held subject to the will of the legislature, to be expressed in the act for the government of cities of the second class, which was to be thereafter passed, and the General Assembly having since provided by that act, adopted March 19, 1894, for a general election of city officers in November, 1895, as it was required under the constitution to do, the officers of cities of the second class elected in November, 1893, have no right to complain, or to have a city ordinance passed pursuant to that provision declared void.

BRECKINRIDGE & SHELBY FOR APPELLANT.

So much of the charter of the city of Lexington as was not inconsistent with sec. 167 of the new constitution was continued in force by that instrument, and, therefore, city officers elected in November, 1893, were elected for two years, as provided by the existing charter. Sec. 160 of the constitution was intended to apply only after the municipalities should be divided into classes. (New constitution, secs. 156-167 inclusive; *Holzhauser v. City of Newport*, 15 Ky. Law Rep., 188; s. c. 94, Ky., 396; *Byrne v. City of Covington*, 15 Ky. Law Rep., 33; *Aydelotte v. South Louisville*, 16 Ky. Law Rep., 166; *Beard v. City of Hopkinsville*, 15 Ky. Law

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Rep., 756; s. c. 95, Ky., 239; Johnson v. Wilson, 15 Ky Law Rep., 853; s. c. 95, Ky., 415.)

J. R. MORTON AND H. MARSHALL BUFORD FOR APPELLEES.

The declaration of sec. 160 of the constitution that the terms of elective officers of towns and cities shall be four years is as fully applicable to the elections held in November, 1893, as to any that can ever be held under the constitution. (Constitution, secs. 166, 167; Holzhauser v. City of Newport, 94 Ky., 396; Byrne v. City of Covington, 15 Ky. Law Rep., 33; Johnson v. Wilson, 95 Ky., 415.)

JUDGE HAZELRIGG DELIVERED THE OPINION OF THE COURT.

The act for the government of cities of the second class, adopted on March 19, 1894, provides among other things, that "at the regular election in one thousand, eight hundred and ninety-five, and every four years thereafter, there shall be elected by the qualified voters of the city, a mayor, city clerk, city treasurer, city attorney, city solicitor, if there be such officer, and civil engineer and assessor and city jailer, who shall hold office for a period of four years, and until their successors are elected and qualified, etc." (Sec. 3172 Ky. Stats.)

To carry out the requirements of this act, the general council of the city of Lexington, a city of the second class, passed an ordinance on March 9, 1895, providing for an election of the officers named, to be held on the Tuesday after the first Monday in November, 1895. Thereupon, the appellees, Wilson, Foushee and O'Neil, respectively treasurer, assessor and civil engineer of the city, filed their joint petition, seeking to have the section declared unconstitutional and the ordinance void, upon the ground that they were elected in November, 1893, by the qualified voters of the city for the term of four years and were so entitled to hold their respective offices. The court below sustained their contention.

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As these officers were elected by the qualified voters of the city, it is contended by them that the length of their terms is fixed in section 160 of the constitution. After providing generally, for the election of the mayor and chief executives, police judges and members of legislative boards of cities and towns, looking, it is manifest, to such elections therein after the adoption of the general law providing for the classification and organization of such towns and cities, the section further provides: "But other officers of towns and cities shall be elected by the qualified voters therein, or appointed by the local authorities thereof, as the General Assembly may, by a general law, provide; but when elected by the voters of a town or city, their terms of office shall be four years, and until their successors shall be qualified."

We think it ought to require no argument to show that this section does not relate to the old officers of towns and cities. The General Assembly, when it came to enact laws for the government of towns and cities, was to provide, by general law, for the election or the appointment of officers; and such of them as were required to be elected by the qualified voters, were to hold for four years. The appellees were old officers. No general law had been passed in November, 1893, providing for their election rather than their appointment. They were not elected by the qualified voters in pursuance of any general law providing therefor. They were officers only in virtue of the old charter of the city of Lexington and were elected by the people only because this old charter so required. They bore the official names given them by the old law, and performed such duties only as were prescribed by the old law.

So far as this section is concerned, therefore, it is absolutely certain that it had no reference to the terms of office of those holding office under the old charters of the towns and

cities of the Commonwealth. We must, therefore, look elsewhere for the law fixing the length of the terms of old officers. Under the head of "Municipalities," from sections 156 to 165, inclusive, of the constitution, a plan of government of cities and towns was mapped out for the guidance of the General Assembly, when it should enact general laws for these municipal bodies; and by section 166, in order to prevent confusion, the old city governments were to continue in force until such time as the General Assembly might provide laws in conformity to the preceding sections, but not longer than until January 1, 1895. For the time being the same offices were to be filled and the same duties were to be performed as were provided for and prescribed in the old law. To ascertain what offices were in existence and what duties were to be performed, and by whom and for how long, the old charters were to be looked to as furnishing an absolute guide. The only limitations found anywhere are: First, the provisions in section 166, terminating the old laws on January, 1895, which could happen only in the event the General Assembly failed to provide new laws for the city governments. Second, the *time* for the expiration of the old terms was fixed in section 167, "at the general election in November, 1893," at which time their successors were to be elected.

Where general laws had been enacted in conformity to the provisions of the constitution, then the successors to the old officers were elected in obedience to those provisions, and their terms of office must expire as provided thereby. These new officers—new not in the sense of having been recently elected, but because they were filling new offices and under a new government—are the officers referred to in section 167, as those "required" to be elected "by general laws enacted in conformity to the provisions" of the constitu-

tion. They are the officers provided for in section 160 of the constitution. But where no general laws had been enacted the successors of the old officers were new only in the sense of having been newly elected, and they are, in fact, old officers, and fill the same old offices under the old charters.

The reasons which may have caused this interference with them was, perhaps, the fact that August elections had been abolished, and moreover, odd years were those only in which they could be elected in pursuance to other provisions of the constitution. At any rate, the provision was a plain one and in no way interfered with the general plan provided for in section 166 of continuing the old governments under their old offices *until such time as the General Assembly might provide by the general laws for the new governments*. They were to hold their old offices, therefore, until such time as the General Assembly might provide otherwise. Their tenure was of uncertain duration, because the General Assembly had, until January, 1895, "within which to provide the new offices." These old officers thus succeeding old officers in November, 1893, are the officers referred to in section 167, as those required to be elected "by this constitution," in that by section 166 the old offices were continued and by section 167 their election in November, 1893, was expressly enjoined. Upon their election in 1893 they had in front of them two events, either of which must terminate their official existence. One was the arrival of the first of January, 1895, without the passage of new laws for the government of towns and cities. The other was the passage of those laws by the General Assembly, by which the new order of things supplanted the old. There was, we may add, another provision which affected their holding. Their successors under the new laws could only be elected "at the general election in November," and then "only in odd years."

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It is fair to presume that the members of the convention anticipated that while the new laws for the various towns and cities, might, in the main, be enacted prior to the election in November, 1893, this might not happen in all cases. Upon the supposition that such laws would be so enacted in most instances prior to that election, the starting-point for elections in odd years was fixed at the November election, 1893, but the following year was also given the General Assembly within which to enact such laws, and the succeeding election must then follow in the next November, coming in an odd year.

Precisely what was anticipated did, in fact, happen, and the General Assembly did just what, in our opinion, it was required to do under the constitution when it provided, in the act of March 19, 1894, for the election of the officers of towns and cities of the second class in November, 1895.

Under the contention of the appellees, old officers, not necessarily to be continued in existence under the new order of things, are, nevertheless, to be continued in office under a section of the constitution (160) providing not for the old, but for the new offices. And that too, when by applying that section to the old officers, they will hold until 1897, two years longer than the city organizations of which they are a part could in any event last.

If no new laws had been enacted, confessedly, the old system must have terminated in January, 1895, under the express provisions of section 166 of the constitution. But singularly enough, as the new laws were passed before January, 1895, the old system, for the destruction of which these new laws were enacted, is revived under the contention of the appellees, and the old officers live until 1897. The measure adopted to kill off the old system is made the instrumentality of its continuance, in a material and important

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particular, even beyond the plain limitations of the constitution. Thus "the stone which the builders refused is become the head stone of the corner."

Judgment reversed with directions to enter judgment upholding the validity of the ordinance.

CASE 97—PETITION ORDINARY—JUNE 14.

Trimble v. Reid.

APPEAL FROM MONTGOMERY CIRCUIT COURT.

1. THE PRESIDENT OF A BANK MAY BE HELD LIABLE IN AN ACTION FOR DECEIT for a false statement of material matters affecting the value of the stock of the bank (1) where he has actual knowledge that the statement is false; (2) where the false statement is made without any reasonable knowledge *bona fide* to believe it to be true; or (3) where it is made in reckless disregard of its truth or falsity. Provided always that the party complaining and to whom damage has resulted has relied on such false statement in making the contract complained of.
2. FALSE STATEMENT OF CONDITION OF BANK—CONSTRUCTIVE KNOWLEDGE.—While there may be cases of constructive knowledge or of imputed knowledge on the part of the president and directors of a bank sufficient to hold them liable for false statements made, yet the facts on which this constructive knowledge is made to depend should be found by a jury under appropriate instructions and not be assumed by the court conclusively to exist.

A. T. WOOD FOR APPELLANT.

To entitle the plaintiff to recover in this action he must prove that defendant caused to be published the statements as to the condition of the bank and that they were false in a material degree, and either known by him to be false or published by him without an honest belief that they were substantially true. And the court erred in not giving an instruction asked by defendant embracing this view. (*Board of Comm'srs of Tippecanoe County v. Reynolds*, 44 Ind.; s. c. 15 Am. Rep., 245; *Cook on Stock and*

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Stockholders, sec. 355; Wakeman v. Dally, 51 N. Y., 27, reported in Thompson on Liability of Officers and Agents of Corporations, p. 299; Derry *et al* v. Peek, Law Reports, 14, App Cas., 337, 359; Arthur v. Griswold, 55 N. Y.; Nelson v. Lulling, 62 N. Y., 645; Schwenck v. Naylor, 102 N. Y., 628; Bellaires v. Tucker, L. R. 13, Q. B. D., 563, note to sec. 355 of Cook on Stock and Stockholders; Ball v. Liveley, 4 Dana, 369; Campbell v. Hellman, 15 B. M., 517; Warren v. Barker &c., 2 Duv., 156.)

**REID ROGERS, O'REAR & BIGSTAFF AND SMITH HURT FOR AP-
PELLEE.**

Brief not in record.

JUDGE GRACE DELIVERED THE OPINION OF THE COURT.

This is an appeal by J. G. Trimble from a judgment of the Montgomery Circuit Court against him in favor of Mrs. E. J. Reid, for the sum of \$1,525.

This suit was filed by appellee, alleging substantially the following state of fact: That in February, 1887, and in July, 1887, she purchased of defendant, J. G. Trimble, thirty-three shares of stock of the Exchange Bank of Mt. Sterling, Ky., at the sum and price of \$120 per share, and paid him for same. That at the time of said purchase, and in order to induce appellee to make same, Trimble stated that said stock was worth \$120 per share; that the book value of same was \$110 to \$115 per share; that said bank had regularly declared a semi-annual dividend of four per cent.

And appellee further charges that appellant being the president of said bank at the time, on a salary, had, at the regular semi-annual periods next before each of said sales, caused to be published the card statement of the condition of said bank, sworn to by the cashier and endorsed on the back by the president and the directors of said bank, calling attention to same and soliciting business on the faith of same. That in this statement were gross errors affecting

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the value of said stock in this, that of the loans and discounts, as published in said card, the sum stated exceeded by thirty thousand dollars or more the actual *bona fide* loans and discounts held by said bank. That of the amount stated as held by said bank in over-drafts, some \$7,500 was utterly worthless, old and stale claims. That in the item stated as due depositors same was stated at \$7,500 less than was really due to same. That as to the undivided profits claimed as on hand in said bank at \$14,000 to \$15,000, that there were no undivided profits, and appellee said, that in these matters, both the personal obligations of appellant, made to induce this purchase, and the published statement of the bank, were false and untrue in point of fact, and that appellant knew them to be untrue at the time they were made and published, and were made with the fraudulent intent and purpose of deceiving the agent who purchased this stock for appellee, and of inducing him to purchase same at a price greatly in excess of its true and real value. That he, this agent, relied on said statement of the condition of the bank as well as on the personal representation of appellant in making said purchases.

Appellee says further that by reason of these several errors and false statements in this bank publication, the stock was not in fact and in truth worth more than \$70 per share at the time of said purchase.

That the officers of the bank made the published statements, as charged (same being copied into the petition), was not denied by appellant, though he denied all knowledge as to the errors or false statements charged to be in same, and denied all fraud, denied that he sold the first twenty-five shares to appellee at all, denied that he owned said twenty-five shares of stock, but said they belonged to a Mrs. Allen, and that Thompson and Jones were her agents in the sale of

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same. The evidence conduced to establish the truth of these latter statements. And denies that he had any personal interest in either of the sales, but admits that he acted as agent for Mize in the sale of the last eight shares of the stock bought by appellee in July, 1887.

Neither Mize nor Mrs. Allen was made a party defendant in the suit.

This petition, it will be observed, was, in all its essential features, an action for deceit, and it was essential to allege, as it did, the false statements, whether personally or by the published statement of the bank. And that appellant knew them to be false when made, as well as that he made them with the fraudulent purpose to deceive appellee's agent in making the purchases.

The petition thus framed presented a good cause of action, and had the case, as charged in the petition, been submitted to the jury by proper instructions we can not say that we would be inclined to disturb the verdict.

The instructions, however, did not follow the case as stated in the petition, but made a wide departure from same.

By the first and second instructions asked by appellee and given by the court, the jury were told, in substance, that it was admitted by the appellant that the statement of the assets and liability of the bank were published, as stated by appellee in her petition, substantially as pointed out heretofore. And that if the jury believed, from the evidence, that said published statement was untrue, to any material degree, and that said published statement was read and relied on by the plaintiff's agent in making the purchase of the stock as described, then they will find for plaintiff.

Thus it will be seen omitting altogether from the question submitted to the jury any inquiry as to whether the appellant *knew that said statement was false*, or whether he made

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or published same with any fraudulent intent or purpose, either generally to deceive the public or those dealing with the bank or dealing with each other on the faith of such published statement, or to particularly deceive the agent of appellee in purchasing this stock. This matter of knowledge of the falsity of these statements or some of them, going materially to the merits of the case, was of the very essence of this action of deceit, and upon which, and upon which only, could this action be maintained.

This defect in instructions one and two as pointed out is not cured by the third instruction, also asked and given by the court. It is as follows: "No. 3. The court instructs the jury that it was the duty of defendant, Trimble, after having been president of the Exchange Bank for a reasonable length of time, to have known of any discrepancy, if any, between the note and bill register and the notes actually on hand, that the jury may find existed at the dates of the purchases of the bank stock by plaintiff's agent, Rogers, as aforesaid, and to have known of any discrepancy between the general and individual ledger, if any, such as the jury may find existed at that time, and to have known the amount of the worthless over-drafts, if any, such as the jury may find existed at that time. And the defendant, after such reasonable length of time, can not rely upon lack of knowledge of any such discrepancies or worthless assets as a defense to this action."

This instruction like the other withholds from the jury all investigation as to whether appellant at the time of the publication of these bank statements knew that they contained false statements, materially affecting the value of this stock sold, or that he published same with the fraudulent intent and purpose of deceiving either the general public, or of this particular purchaser.

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Thus abandoning the charge as made in the petition, and substituting in its stead a question of diligence or want of diligence in the discharge of his duty as president of the bank, for the one of knowingly making a false statement or of fraudulently making these false statements before referred to.

This departure from the allegations of the petition, and the substitution of one thing for the other, is attempted to be justified under the decision of this court in the case of Prewitt v. Trimble, 92 Ky., 176.

In this, however, counsel for appellee forget or overlook the fact that this case is widely different from that in this, that in that case, assuming the condition of the bank to be the same, and the errors in the statements of the president of the bank as to its assets and liabilities the same as in this case, yet that case was upon a contract made by Prewitt's trustee with Trimble, whereby Trimble on these statements *sold his own stock* to Prewitt, at the price of \$120 per share, and that suit was for a rescission of that contract, brought within a reasonable time, and tendering back the stock purchased. In such a case the law is materially different from the law in an action for deceit as in this case. Here the evidence shows that Trimble was not the owner of any of the stock sold, and that as to the Mrs. Allen stock he was not her authorized agent, though he negotiated the sale.

In that case it was only necessary to show that the false or erroneous statement was made; that it formed the basis of the contract. That said statements entered into the price paid, and received by the vendor for his stock, that the statements were relied upon by the party purchasing, and that they were in fact untrue at the time, and that by reason of same a price was paid far in excess of the true value of the

stock sold. In such a case the court will, on these facts, rescind the contract without any fraudulent intent being shown, without any knowledge actual or constructive on the part of the vendor that the statements were in fact false.

So that while the statements and conclusions of the court were strongly against the vendor of the stock in the case of *Prewitt v. Trimble*, we are not prepared to say that on the facts of the case then under consideration they were erroneous.

Speaking on this subject Mr. Cook in his work on *Stock and Stockholders*, sec. 355, says: "In order to sustain an action for damages for deceit whereby plaintiff was induced to buy or sell shares of stock, it is necessary for plaintiff to prove that statements were made, or acts done, which were fraudulent; that the person guilty of them knew they were fraudulent, and that the plaintiff acted on such statements in buying or selling said stock."

In the case of *Wakeman v. Dalley*, 51 N. Y., 27, the court speaking of a case wherein the paid-up capital stock of the company was stated to be \$150,000, said: "There is no proof that Dalley knew that the statement was false, or that he made it with the intention to deceive any one. Such knowledge and intent can not be presumed, but must be proved."

Other cases of our own court might be cited sustaining the general proposition that some knowledge of the falsity of the statement made is essential.

In reference to bank officers, and, especially to the president of the bank, the rule in Kentucky seems to be extended, looking to certain states of case where such officer may be held to have this constructive knowledge.

In the case of the *United Society of Shakers v. Underwood*, and others, 9 Bush, 609, this court said: "It is the

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duty of bank directors to use ordinary diligence to acquaint themselves with the business of the bank, and whatever information might be acquired by ordinary attention to their duties, they may, in a controversy with persons transacting business with the bank, be presumed to have. They can not be heard to say, that they were not apprised of the facts shown to exist by the ledger, books, accounts, correspondence . . . and statements of the bank, and which would have come to their knowledge, except for their gross neglect or inattention."

In the same case it is further said: "The community has the right to assume that the directors do their duty and to hold them personally liable for neglecting it."

Again, in *Graves v. Lebanon Bank*, 10 Bush, 23 and 32, in speaking of a false statement as to the condition of the bank involving some dereliction of duty of its cashier, and of the liability of the sureties on the cashier's bond, the court, assuming that the sureties read and relied on such statements, said: "A fraud may be perpetrated by the assertion of facts that do not exist, ignorantly made by one whom the person acting upon the assertion has a right to suppose has used reasonable diligence to inform himself, as by concealing facts known to exist."

Again, it is said in *Cooper v. Schlesinger*, 111 U. S., 148, that "a statement, recklessly made without knowledge of its truth, but which is really false, is a false statement, knowingly made, within a settled rule."

Thus, while it is true that there may be cases of constructive knowledge or of imputed knowledge, on the part of the president and the directors of a bank, sufficient to hold them liable for false statements made, yet the facts on which this constructive knowledge is made to depend should be found by a jury under appropriate instructions, and not be as-

sumed by the court conclusively to exist, as was done in the third instruction in this case.

We gather from the authorities that the president of a bank may be held liable in an action for deceit for a false statement of material matters affecting the value of the stock of the bank:

1st. Where said false statement is made and the president has actual knowledge that it is false.

2d. Where a false statement is made, but without any reasonable knowledge *bona fide* to believe it to be true. Or

3d. Where it is made in reckless disregard of its truth or falsity.

And under appropriate instructions framed on this line the question should always be submitted to the jury. Of course, in all cases assuming it as proving that the party complaining, and to whom damage has resulted, has relied on such statements in making the contract complained of.

It may further be remarked that this question of fraudulent intent or guilty knowledge can not often be proved by direct evidence, but must, in nearly all cases, be supported by circumstantial evidence, leaving the main fact to be found by the jury from other facts present. It is quite proper that every fact and circumstance bearing on this question of knowledge, actual or constructive, within the lines indicated are competent in evidence. This seems to have been the view of the court below on the trial, and is, therefore, unobjectionable.

Wherefore for the error indicated this cause is reversed and remanded for further proceedings not inconsistent with this opinion.

Judge Hazelrigg not sitting in this case.

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CASE 98—PETITION ORDINARY—JUNE 15.

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APPEAL FROM JEFFERSON CIRCUIT COURT, COMMON PLEAS DIVISION.

1. **POWERS OF SPECIAL JUDGE.**—Under sec. 903 of the Kentucky Statutes, which provides that in every county having a population of 75,000 or more and constituting of itself a separate judicial district, the judges of the circuit and county courts shall appoint an official indexer of the public records, a special judge or one of the divisions of the Jefferson Circuit Court has no right to participate with the judges of the other divisions in the election of an indexer, as the statute authorizing the election of a special judge was not intended to confer upon the attorney thus elected any power except such as is necessary to hold court for the occasion.
2. **THE ACT CREATING THE OFFICE OF INDEXER** and authorizing the judges to appoint is not unconstitutional, but is expressly authorized by sec. 107 of the constitution."

WM. H. YOST, D. W. SANDERS AND W. B. THOMAS FOR APPELLANT.

1. When the appellant was appointed, if the meeting held for the purpose was legal, the function of the enabling act was executed and the power was exhausted. (*Griffith v. Frazier*, 8 Cranch, 1; *Thomas v. Burnes*, 23 Miss., 550; *Hoke v. Fields*, 10 Bush, 144; *Mechem on Public Officers*, secs. 113-120.)
2. A special judge of the circuit court has all the powers of the regular judge. (Ky. Stats., secs. 968, 1029.)
The words "judge" and "court" are used throughout the statutes as synonyms. (*Boon v. Bowers*, 30 Miss., 257; Ky. Stats., secs. 2241, 1597, 392, 409, 1037, 2947, 926, 962, 4637, 4539, 5559, 2203; Civil Code, secs., 218, 298, 732, sub-sec. 12.)
3. John L. Dodd was on the 3d day of January the judge *de jure* of the chancery division of the Jefferson Circuit Court. (Work on Courts, p. 382.)
But if not, still his acts as a *de facto* judge merely can not now be questioned in so far as they affect third parties or the public. (*Turney v. Dibrell*, 3 Baxter, 235; *State v. Allings*, 12 Ohio, 20; *Dugan v. Farrier*, 18 Brown, 383; *Norfleet v. Sfaton*, 73 N. C., 548.)
4. The indexer is an officer of the Jefferson Circuit Court, and the act providing for his appointment by the court is constitutional.

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(Ky. Stats., sec. 909; Seebold *ex parte*, 100 U. S., 397; Mechem on Public Officers, sec. 106.)

If, however, the court below was right in holding that the indexer is not an officer of the Jefferson Circuit Court, and that the act in appointing him was non-judicial, there can be nothing clearer than that the act is unconstitutional. (Hayburn's Case, 2 Dallas, 409; United States v. Ferreir, 13 How., 49; McLean County v. Deposit Bank, 81 Ky., 262; Commonwealth v. Addams, Clerk, 95 Ky., 588; Smith v. Strother, 68 Cal., 194.)

HUMPHREY & DAVIE, CARROLL & HAGAN, O'NEAL & PRYOR
FOR APPELLEE.

1. The constitution makes a clear distinction between the "judges of the Circuit Court" who are limited in number, elected by the people, commissioned by the governor, have a fixed salary, and hold for five years; and "special judges," who are unlimited in number, not elected by the people, not commissioned, and are changed day by day. (Constitution, secs. 136, 125, 137, 135.)
2. The powers of a "judge of the circuit court" are many and varied; while the power of a "special judge" is strictly limited to "hold-ing court for the occasion." (Constitution, sec. 136; Kentucky Statutes, sec. 1029.)
3. In providing that, on the failure of the circuit court judge to at-tend the court room on any day, a special judge shall be chosen by the bar "to hold court for the occasion," the additional words in the statute (sec. 1029): "Said special judge shall have the pow-ers of a circuit judge," do not deprive the regular circuit court judge of his office, or ministerial powers, but only mean that the special judge shall have such judicial powers as may be necessary to enable him to "hold court for the occasion." These words do not confer ministerial powers, which are not necessary for doing the only thing the special judge is empowered to do—to "hold court for the occasion;" and such general words will be limited to the special purpose in view. (Barbour v. City of Louisville, 83 Ky., 100.)
4. The statute could not confer such power on the "special judge;" for the constitution only authorizes a special judge to be given power to hold court." (Constitution, sec. 136.)
5. The selection of a special judge to try a particular case or to try all cases during the day or term of the circuit court judge's fail-ure to attend the court room, does not remove the circuit judge from his office, or suspend for a moment his circuit judge powers as a peace officer or his judicial power of trying or deciding equity and other cases, or his right to exercise

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the ministerial duties imposed upon him. He may, very properly, be exercising his ministerial powers, and performing his ministerial duties, at the very time the special judge is "holding court for the occasion" in some case in which the circuit court judge can not sit. (*Wallace v. Helena R'y*, 10 Mont. 24, (24 Pac., 626; 25 Pac., 278).)

6. The statute conferred the power to appoint and remove the public indexer, not upon the numerous and ephemeral "special judges," changing from day to day; but upon the four regular "judges of the circuit court" and the county court judge. (Kentucky Statutes, sec. 908.)
7. The power to appoint a public indexer was not a judicial power, nor a part of the powers of any of the numerous special judges who might be, on different days, "holding court for the occasion;" but was a ministerial power, to be properly exercised not in court, nor while holding court, but outside of court. (*Hoke v. Field*, 10 Bush, 145; *Taylor v. Commonwealth*, 3 J. J. Mar., 401; Am. & Eng. Ency. of Law, vol. 19, p. 418.)
8. Nor is the appointing of a public indexer, strictly speaking, an exercise of the "powers of a circuit judge;" for the circuit judges of the State generally do not have such power; nor did it become among the recognized powers of a circuit judge (*i. e.*, of all circuit judges) merely because the four circuit judges in Louisville were required to perform this outside ministerial duty. (*Wallace v. Helena R.*, 10 Mont. 24 (24 Pac., 626; 25 Pac., 278); *Lewis v. Curry*, 78 Mo., 53; *People v. Bush*, 40 Cal., 334; *State v. Brown*, 35 Kansas, 169; *Heller v. Sullivan*, 64 Cal., 378; *State v. Noble*, 10 Am. St. Reports, 143 (118 Ind., 350).)
9. It was not unconstitutional for the legislature to vest the power and duty of appointing an indexer in the judges of the circuit court and county court; for other than judicial duties are often imposed on judges, and most of the courts are required to appoint officers, such as clerks, marshals, tipstiffs, commissioners, examiners, etc. (Constitution, sec. 107; *State v. Higgins*, 28 Southwestern, 638 (124 Mo.) *Hoke v. Field*, 10 Bush, 144; *Taylor v. Commonwealth*, 3 J. J. Mar., 401; *State v. Brown*, 35 Kansas, 169; *People v. Bush*, 40 Cal., 344; *State v. Laughton*, 19 Nev., 205; *Lathrock v. Britton*, 30 Cal., 680; *People v. Edwards*, 9 Cal., 286; *Pennington v. Woolfolk*, 79 Ky., 13; *Speed & Worthington v. Crawford*, 3 Met., 207; *People v. Provines*, 34 Cal., 520; *Story's Com. on Constitution*, sec. 517; Ency. of Law, vol. 12, p. 15.)
10. This power to appoint is a personal trust, and a judge of the circuit court could not delegate it to a special judge. (*State v. Noble*, 10 Am. St. Rep., 154; *Van Slyck v. Trempeleau*, 20 Am. Rep., 50, (39 Wis., 390).)

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11. The power granted to the four circuit judges and the county judge, required, for its valid exercise, the concurrence of three of them. (Ky. Stat., sec. 448; Ky. Code, sec. 679; *Hewitt v. Craig*, 86 Ky., 27; *State v. Porter*, 113 Ind., 80; *Dillon on Municipal Corporations*, 4 Ed., sec. 283, 279; *Coles v. Trustees*, 10 Wend., 661.)
12. Not only was the vote of Special Judge Dodd for Roberts void, but that of County Judge Hoke was also void, and Roberts only received one legal vote. The office of indexer was not to come into existence until February, and County Judge Hoke's official life was to end, and that of his successor, Judge Richie, was to begin, on January 7th. The pretended election of Roberts was on January 3d. The outgoing county judge had no power to fill an office which would not come into existence, and therefore could not have a vacancy in it, until after his own official life had ceased. (*State v. Meehan*, 45 N. J. Law, 191; *Ency. of Law*, vol. 19, p. 427.)

JUDGE GUFFY DELIVERED THE OPINION OF THE COURT.

On the thirteenth day of March, 1895, the appellant instituted this action in the Jefferson Circuit Court, Common Pleas Division, against the appellee, alleging in substance that on the third day of January, 1895, the judges of the Jefferson Circuit Court, and the judge of the Jefferson County Court, pursuant to notice duly given, met in the court house in Louisville, Kentucky, for the purpose of appointing an official indexer of the public records of Jefferson county, whose term of office began on the first Monday of February following his appointment, and continuing for the term of three years. That the said judges of Jefferson Circuit Court and the judge of the Jefferson County Court did meet and were duly organized by the election of one of the judges of the Jefferson Circuit Court as chairman of the board and by the election of Thomas Lawson, secretary. That the said board was composed of the following judges, to-wit: Judge Wm. L. Jackson, of the criminal division, Sterling B. Toney, judge of the law and equity division, Emmett Field, judge of the common pleas division, John

L. Dodd, judge of the chancery division and Wm. B. Hoke, judge of the Jefferson County Court.

That the said John L. Dodd has been an attorney of the Jefferson circuit for more than nineteen years past and possessed of the qualifications of a circuit judge; that on the second day of January, 1895, he was duly elected and qualified and took the constitutional oath as such judge of the chancery division of the Jefferson Circuit Court, in accordance with the provision of sec, 968, sub-div. 2 of art. 2, chap. 35, Kentucky Statutes, because of the fact that Judge I. W. Edwards, the regularly elected judge of said court, was absent and unable to perform the duties required of him, as judge of said court, and that said John L. Dodd was the sole acting judge of said chancery division during the month of January, 1895, and further alleges his qualifications for and appointment to the office of indexer, and that he executed bond and took the oath required by law.

The petition further alleges that after said appointment and qualification, Wm. L. Jackson and Emmett Field, judges of the criminal and common pleas divisions respectively of the Jefferson Circuit Court, and Charles G. Richie, judge of the Jefferson County Court, convened in the court house in Louisville, Kentucky, on the eleventh day of January, 1895, for the purpose of attempting to appoint an official indexer of the public records aforesaid and did appoint Paul Cain, of the city of Louisville, to the said office of indexer. The petition further alleges that said appointment is illegal and without authority of law, and that he, appellant, is entitled to said office and that said Paul Cain has desk room furnished him by the clerk of the Jefferson Circuit Court in his office, and is attempting to intrude into, usurp and exercise the functions of said office in violation of plaintiff's right, and plaintiff prayed that he be adjudged

entitled to the said office and that the defendant be adjudged not entitled thereto.

The defendant, in his answer, in substance, denied the validity of the appellant's election and appointment; denied that there was any such meeting or organization of the judges as alleged by plaintiff, and denied that the said John L. Dodd was the sole judge of the chancery division of the Jefferson Circuit Court during the month of January, and denied that he had any right to participate in the appointment of the said office of indexer, and says that I. W. Edwards was not present at the meeting mentioned by plaintiff; that Wm. L. Jackson and Emmett Field did not participate in said pretended election of January 3, 1895, and refused to be parties thereto.

The defendant further alleged that the said Judges Field and Jackson and Charles G. Richie, judge of the Jefferson County Court, pursuant to notice duly given, met in the court house on the eleventh day of January, 1895, for the purpose of appointing an official indexer, and did then and there appoint defendant to said office and that he is duly entitled to same.

By agreement Hon. James S. Pirtle was selected as special judge to try this cause, and the law and facts submitted to the court without the intervention of a jury, and upon final hearing the court adjudged that the appellant was not entitled to the said office of indexer and that the appellee, Paul Cain, was, on the eleventh day of January, 1895, duly, legally and lawfully appointed to the office of official indexer of public records of Jefferson county, and that he is entitled to the emoluments, honors and profits thereof, and is entitled to be placed in possession thereof, and from that judgment this appeal is prosecuted.

The principal question involved is whether or not the

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Hon. John L. Dodd was authorized to participate in the appointment of the officer in question.

Section 908 of the Kentucky Statutes provides that in every county having a population of 75,000 or more and constituting of itself a separate judicial district the judges of the circuit court and county court shall, in the month of January, 1895, and in the same month every three years thereafter, appoint an official indexer of the public records, etc.

The appointing power is, by the statute, vested in the four judges of the Jefferson Circuit Court and the judge of the Jefferson County Court, but it is insisted by the appellant that the Hon. John L. Dodd having been elected special judge of the chancery division became invested with all the powers of the regular judge, I. W. Edwards.

Section 136 of the constitution provides that the General Assembly shall provide by law for holding circuit courts when from any cause the judge shall fail to attend, or if in attendance, can not properly preside.

Section 1029 of the Kentucky Statutes, by virtue of which said Dodd was elected as special judge, reads as follows: "When for any cause the judge presiding over any branch of said court fails to attend, the judge presiding over any other branch may attend, and hold said court for the occasion; if no judge presiding over any branch of such court attends, the attorneys of said court in attendance thereon shall elect one of their number, having the qualifications of a circuit judge, to hold the court for the occasion. Such special judge shall have the powers of a circuit judge."

It seems clear to us that the special judge has no power, except those given him by the statutes, and there is nothing in the statute conferring any power except such as is necessary to hold court for the occasion. The language used

“shall have the power of a circuit judge” simply means that he shall have the same power of a circuit judge so far as may be necessary to the discharge of the duties devolving upon him by reason of his election for that occasion or purpose, which includes such powers as may be necessary to the discharge of the duties. It is worthy of note, too, that there is no provision in the constitution for filling temporarily the office of circuit judge where the judge is absent or unable to attend to the duties of the office, but the sole provision made is to provide for holding court in the absence of the judge or his disqualification.

We are, therefore, of the opinion that the Hon. John L. Dodd was not authorized to participate in the appointment of the officer in question, hence the attempted appointment of appellant was null and void, he having received but two legal votes.

The rule as to the validity of the acts of a *de facto* officer has no application to the case at bar.

It is not pretended that the Hon. John L. Dodd had become a circuit judge in the room of Hon. I. W. Edwards. There was no vacancy in the office of circuit judge in Jefferson county, hence all the power or authority that Judge Dodd claimed or sought to exercise was derived from his election as special judge to hold court for the occasion arising out of the absence of the judge.

The suggestion that the act creating the office in question and authorizing the judges to appoint is unconstitutional is not tenable. Section 107 of the constitution reads as follows: “The General Assembly may provide for the election or appointment for a term not exceeding four years of such other county or district ministerial and executive officers as may, from time to time, be necessary.”

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The above section is conclusive as to the constitutionality of the act in question.

The judgment of the court below is affirmed.

CASE 99—PETITION EQUITY—JUNE 18.

Commonwealth v. Chinn, &c.

APPEAL FROM FAYETTE CIRCUIT COURT.

1. **RECITALS OF STATUTE AS EVIDENCE.**—As against the Commonwealth and as against the person for whose relief a statute was passed, the statute is evidence of the facts which it recites, but it is not evidence as against strangers.
2. **SAME—EVIDENCE AS TO POPULATION OF COUNTY.**—The fact that a county has been created by the legislature a separate judicial district under sec. 138 of the constitution, which requires that the county shall have a population of forty thousand in order that this may be done, is not evidence that the county has that great a population except for the purpose of upholding that particular statute, and is therefore not sufficient to bring the officers of the county within the operation of section 1776 of the Kentucky Statutes, which provides that in each county having a population of over forty thousand and under seventy-five thousand the salary of each of several county officers shall be limited to \$3,000 per annum, after paying deputies and other expenses, the fees of such deputies to be fixed by the county judge.

WM. J. HENDRICK, ATTORNEY GENERAL, FOR APPELLEE.

The county of Fayette having been made a separate judicial district upon the legislative faith that it had a population of 40,000 or more and having obtained valuable rights, privileges and concessions on this asserted fact, she can not now be heard to deny the said population.

J. R. MORTON AND BRECKINRIDGE & SHELBY FOR APPELLEES.

1. The legislature is not prohibited from constituting a county having a population of less than 40,000 a separate district. (Kentucky Statutes, sec. 1776.)

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2. The legislative action as to Fayette county is conclusive only that at the time of the passage of the act and for the purposes of that act the county had a population of 40,000, and is not evidence for any purpose that such was its population at any different time. (Wharton on Evidence, sec. 635.)
3. Though the act of the legislature in making Fayette county a separate district should be conclusive that the population of that county is as much as 40,000, which is as far as the conclusion could possibly extend, still section 1776 of the Kentucky Statutes does not affect the appellees, since it applies only to counties having a population of more than that number. (Constitution, secs. 128, 138; Rex v. Green, 33 Eng. Com. Law Rep., 145, 6 Adolph & Ellis, 564; R. v. Sutton, M. & S., 532.)

JUDGE GRACE DELIVERED THE OPINION OF THE COURT.

This appeal arises upon a rule sued out by the county attorney of Fayette county against C. C. Chinn, the county clerk, and E. T. Gross, the sheriff of said county, requiring them to appear before the judge of the county court on the twenty-ninth day of January, 1895, to show cause why they should not name their several deputies in their respective offices, so that said county judge might fix the salaries of same, all this pursuant to sec. 1776 of the Kentucky Statutes. And all looking to a limitation of the fees of said officers respectively, as contemplated in said section.

Said section provides that "in each county having a population of over 40,000, and under 75,000, the salary of the several officers, jailer, county clerk, sheriff and others shall be limited to \$3,000 per annum, after paying the expenses incidental to said offices respectively, and the deputies that may be necessary to discharge the duties of such office, the fees of such deputies to be fixed by the county judge of each county respectively."

To this rule a response was filed setting up affirmatively that the population of Fayette county was less than 40,000; that it had never been as much as this.

To this answer a reply was filed, and without denying that the population of the county was, in fact, less than 40,000, said, that, under the provisions of the constitution of Kentucky, sec. 138, it was provided that "each county having a city of 20,000, and a population, including said city, of 40,000, the same may be constituted a district," meaning a judicial district. And then said reply further saying that under this section the legislature had in the division of the State into circuit court districts, constituted the county of Fayette into a separate district, and established a court therein of continuous session, pleading same as conclusive of the question of population, and that the *county, therefore had the requisite number.*

To this reply a demurrer was filed and sustained, and no further pleading being offered, and no evidence, the courts below both county and circuit, dismissed the rule, and hence this appeal.

It will be noticed that under this sec. 1776 there is neither preamble nor recital in the act of the legislature that the county of Fayette contains a population of 40,000 or over, neither is this affirmed of any other county in the State.

Neither is this enactment limiting the fees of the several county officers in counties having a population of over 40,000, and under 75,000, passed in pursuance of any express provision of the constitution.

The only provision directing expressly the fees of the county officers to be fixed on a salary basis is the 106th section, and by this it is provided that "the fees of county officers shall be regulated by law." In counties or cities having a *population of 75,000 or more*, the county officers, naming them, shall be paid a salary to be fixed by law, but not to

exceed seventy-five per centum of the fees collected by said officers respectively.

We do not doubt, however, the authority of the legislature to classify the other counties of the State, and to fix a salary for the respective county officers (as in this case), taking care to make it general, and not obnoxious to the several provisions of the constitution inhibiting special legislation.

It is only by inference that it may be supposed that the legislature assumed that the county of Fayette had this population of 40,000, from the fact that, under sec. 138, it created this county into a separate judicial district, as it did also the counties of Kenton and Campbell, and under like presumption, of a population of over 150,000, it created the county of Jefferson a separate circuit court district, with four judges.

And yet the question remains as to what effect this action of the legislature had on the particular question before us. That is, whether this assumption, under a section of the constitution as to courts, of a population of a certain amount, is conclusive or even *prima facie* evidence as to these officers, who are strangers to that act.

It will be noted that in this chapter 48 of the Statutes, wherein this section 1776 as to the fees of these officers appears, there is no provision made for ascertaining the population of the respective counties of the State wherein it may be supposed this statute is to apply.

Speaking of the effect of recitals of matters of fact in legislative acts Mr. Wharton, in his work on Evidence, section 635, speaking of both the English and American rule, says: "A public statute has been held admissible in evidence to prove the facts which it recites. Thus it has been held that a recital of a state of war, contained

in a public statute, is evidence of such war, and a recital in a statute of public disturbance and riots is proof of such disturbance and riots. But such proof is only *prima facie*."

In section 636 the author says: "As long as in England the passage of private statutes was conditioned on the approval of the judges, recitals in such statutes were admitted as evidence of the facts, which they stated. When, however, this pre-requisite was no longer insisted on, such recitals were held only to imply notice in the parties, *such notice not reaching to strangers*." Such is no doubt the rule in the United States, as against the party for whose relief the statute was passed. And as against the State such recitals are *prima facie* proof, but *they are not evidence against strangers*.

The author cites both English and American cases in support of this doctrine.

In a case in 3 Litt., 472, *Elmondorff v. Carmichael*, this doctrine is announced: "The facts recited in the preamble of a private statute may be evidence between the Commonwealth and the applicant, or the party for whose benefit the act was passed, but as between the applicant and another individual, whose rights are affected thereby, the facts recited ought not to be evidence."

So, that, while we conclude that the act of the legislature in creating separate judicial districts in the counties of Fayette, Kenton, and Campbell, respectively, is not to be questioned as to the authority, power and jurisdiction of said courts, yet such act can not be received in evidence, nor have any decisive influence as to county officers of said counties. These hold their several offices by reason of separate independent constitutional provisions, the same applicable alike to all counties of the State, without reference to popu-

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lation. And as to the action of the legislature in creating the county of Fayette into a separate judicial district they are strangers and not bound thereby.

As to whether the county of Fayette has 40,000 population, so as to embrace her county officers, and thus to limit them in the amount of salary to be received by them, different and less than the fees received by officers of other counties in the State, is a question of fact, and when disputed, must be determined by evidence like any other fact that may be the subject of judicial inquiry.

And in this case the fact being disputed, and no evidence being offered by the State, it was proper to dismiss the proceeding.

Judgment affirmed.

CASE 100—APPEAL TO CIRCUIT COURT—JUNE 19.

Brann v. Hart, &c.

APPEAL FROM PENDLETON CIRCUIT COURT.

1. TITLE OF ACT.—The act of March 20, 1880, entitled "an act to prohibit the sale of spirituous, vinous or malt liquors or mixtures of either in the Seventh magisterial district of Pendleton county," relates to but one subject.
2. REPEAL OF LIQUOR LAWS BY CONSTITUTION.—Neither general nor local prohibitory liquor laws which were in force at the time of the adoption of the present constitution were repealed by that instrument. The manner in which such an existing statute may be repealed or nullified is expressly provided for in chapter 81 of the Kentucky Statutes, and a local prohibitory liquor law which has not been repealed or nullified in the manner provided in that chapter must be regarded in full force.

WM. H. HOLT AND W. J. PERRIN FOR APPELLANT.

1. The special act of the legislature prohibiting the sale of all spiritu-

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ous, vinous or malt liquors in the Collensville Precinct in the county of Pendleton is repealed by the general revenue law allowing distillers in good faith of spirituous liquors to retail in quantities not less than a quart, the product of their own manufacture upon the payment of \$75 license tax. (Session Acts 1879, vol. 1, page 502; Kentucky Statutes, secs. 4205-4224, 4267; constitution, secs. 59, 61.)

2. The special act in regard to the sale of liquor in the Collensville precinct in Pendleton county is unconstitutional because it relates to two distinct and unconnected subjects under one title. (Sutherland on Statutes & Constitutions, 214; Endlich, sec. 206.)

LESLIE T. APPLGATE AND L. P. FRYER FOR APPELLEES.

1. The court below being the judge of the law and facts, and there being no bill of evidence in the record, this court can not disturb the judgment of the court below. (Kentucky Statutes, sec. 4212.)
2. The local law having prohibited the sale of spirituous liquors in the Collensville precinct of Pendleton county, the general law granting to distillers the right to retail liquor upon the payment of \$75 license tax does not affect the prohibition in this especial territory under the said local law. (Session acts 1879, vol 1, sec. 502.)

JUDGE LEWIS DELIVERED THE OPINION OF THE COURT.

By an act of March 20, 1880, entitled "An act to prohibit the sale of spirituous, vinous or malt liquors, or mixtures of either, in the seventh magisterial district of Pendleton county," it was made unlawful for any person to sell spirituous, vinous or malt liquors, or mixtures of either, or to obtain a merchant's coffee-house, tavern, or other license, to sell within limits of seventh magisterial district in Pendleton county.

In 1893, appellant, Brann, operating a distillery in that district applied to Pendleton County Court for a distiller's license to sell, and due notice having been given an order was made to that effect. But upon appeal to Pendleton Circuit Court that order was set aside, leaving appellant without any license to sell. And the question on this appeal is

whether the act of March 20, 1880, referred to, has been repealed, or is still in force? Another question is, however, made, that we will first dispose of; that is, whether the act is not unconstitutional and void, because relating to more than one subject?

But it seems to us the provision made therein against the sale, against issuing a license of any kind for such sale, for punishment of a person violating the first section of the act, all relate directly to the subject expressed in the title.

It is contended that the act in question is repealed by section 59 of the constitution, which forbids the General Assembly passing local or special acts concerning, among others, the subject "of taking the sense of the people of any city, town, district, precinct, or county, whether they wish to authorize, regulate or prohibit the sale of vinous, spirituous or malt liquors, *or alter the liquor laws.*"

In our opinion it was not intended by that section to *ipso facto* repeal existing laws, either general or local, prohibiting the sale of liquors. On the contrary, the words we have italicized show such repeal was intended to be provided for by a general law on the subject to be thereafter enacted.

Section 4205, Kentucky Statutes, authorizes licenses granted to merchants, druggists and distillers for the purpose of retailing liquor upon the terms therein provided. And by section 4267, of the same chapter, title of which is "Revenue and Taxation," all acts and parts of acts in conflict with that chapter are repealed.

But it certainly was not intended by that section to repeal any act like the one in question. For the manner in which such an existing statute may be repealed or nullified, as well as the manner in which sale of spirituous, vinous or malt liquors may be hereafter prohibited in any city, town

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county, district, or precinct, is expressly provided for in chapter 81, Kentucky Statutes, title of which is "Local Option Law," which was intended to, and does, regulate the whole subject, as provided for in section 61 of the constitution. And as it does not appear that the act of March 20, 1880, has been repealed or nullified in the manner provided in chapter 81, it must be regarded in full force. Consequently, the county court order granting license to appellant was properly set aside.

Judgment affirmed.

CASE 161—PETITION EQUITY—JUNE 26.

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APPEAL FROM HARRISON CIRCUIT COURT.

1. GUARDIAN AND WARD.—Where in a suit involving the settlement of a guardian's accounts the guardian was credited by the amount of certain notes belonging to the wards in arriving at the amount for which judgment was rendered against him, and it was recited in the judgment that these notes "are not charged to the defendant in making up the judgment. The plaintiffs may hereafter make claim on account of said notes if they are not collected," that judgment is not a bar to this action by the wards against the guardian and his sureties to recover the amount of such of those notes as have not been collected. The fact that payments made on the notes have by mistake been credited on the judgment upon the idea that the notes were taken into account in making up the judgment does not affect the right of the wards to recover of the guardian and his sureties the amount of the unpaid notes.
2. IF A GUARDIAN REMOVES THE PROPERTY OF HIS WARDS FROM THE STATE without sanction of a court of chancery jurisdiction, in violation of sec. 18 of chapter 48 of the General Statutes, the sureties in his bond become liable on his failure to account therefor. And where a guardian accepts the notes of non-resi-

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dents for any part of the estate of his ward it amounts to a removal of so much of the property of the ward from the State, and the guardian and his sureties are liable for the amounts of the notes without regard to whether they could have been collected.

J. W. LUCAS FOR APPELLANTS.

1. The judgment in the suit for settlement of the guardian's accounts is not a bar to the recovery sought here because that judgment expressly authorized appellants to make claim for these notes in case they were not collected.
2. If Perrin was credited by these notes then appellants are entitled to recover their full amount because of his having removed his ward's property out of the State and because of his failing to take good security. (Gen. Stats., p. 707, sec. 18; *Clay v. Clay*, 3 Met., 548; *Campbell v. Golden, &c.*, 79 Ky., 544.)

J. Q. WARD OF COUNSEL ON SAME SIDE.

J. I. BLANTON FOR APPELLEES.

1. Perrin was charged with every dollar that came into his hands, and when the court omitted these Texas notes it omitted them as a credit claimed by Perrin, not as an asset of the estate that he had not charged himself with.
2. The fact that the May note of over \$780 was credited on the judgment shows the construction which the parties put upon the judgment, and supports the contention of appellees.

JUDGE PAYNTER DELIVERED THE OPINION OF THE COURT.

Minnie S., Margaret R. and Robert B. Lyne were infants, and A. Perrin duly qualified as their guardian in the Harrison County Court. Failing to properly manage the estate of his wards, he was removed and the appellant, H. C. Smith, was appointed and duly qualified as the guardian of the infants.

The appellees, Leonard Drane, John C. May, T. J. Megibben and G. H. Perrin, were the sureties in the bond which A. Perrin gave as guardian of the infants. Megibben and G. H. Perrin died and their personal representatives were made defendants.

Quite a large estate came into the hands of A. Perrin as guardian. Upon the appointment of H. C. Smith as guardian, he instituted suits for his wards in the Harrison Chancery Court, to enforce a settlement of the accounts of the previous guardian. The court referred the question of accounts to a commissioner, who made reports in the cases. Perrin was charged with such sums as came to his hands, and was given certain specified credits. Exceptions were filed to the reports made by the commissioners. It appeared in the cases that Perrin held three certain notes dated March 1, 1888, for the sum of one thousand, seven hundred and ten dollars and seventy-five cents, each executed by the Gray Bros., one of which was payable in three years, one in four years and the other in five years from date. They were made payable to Perrin as guardian of the infants.

The Gray notes were called Texas notes, as the makers lived in Texas. In making the statement of the accounts the commissioner charged Perrin with the various sums coming to his hand and credited him with various sums and, among others, the Gray Bros.' notes and one note for about seven hundred dollars, known as the May note. In thus stating the accounts the commissioner ascertained and reported the balance due each ward. The commissioner found to be due from their guardian, sums as follows:

To Minnie S.\$5,113 86

To Margaret R. 5,996 98

To Robert B. 6,470 27

In doing this, as stated, Perrin was credited with the Gray Bros. and May notes.

The court in rendering judgment, said: "The court has examined the cases as if there had been no reports, and it is not unpleasant to find that the judgments do not differ widely from the *findings* of the special commissioner."

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The court gave judgments against Perrin in favor of the wards, as follows, viz:

Minnie S.\$5,160 00

Margaret B. 5,720 00

Robert B. 6,260 00

In the judgment fixing the foregoing sums as being due the respective wards, the court said: "It is remarked that the Texas notes and the May notes, on account of which the plaintiffs make claim, are not charged to the defendant in the making up of the judgment. The plaintiffs may, hereafter, make claim *on account of said notes* if they are not *collected*." Perrin failing to pay the sums adjudged against him, the appellants instituted an action against his sureties and recovered a judgment against them for the amounts due the wards as fixed by the judgment, less payments made subsequent thereto.

In the meantime the May notes had been collected, and to our surprise, it appears to be credited on the judgment which appellants secured against the sureties. Failing to collect the Gray or the so-called Texas notes, the appellants instituted suits to recover the amount thereof and the interest thereon. It is alleged in the petition that the guardian has been unable to collect them; that he has been making an effort to do so; that he has been unable to collect them, except a little interest thereon; that F. B. Gray, Frank Gray and Geo. C. Gray constituted the firm of Gray Bros.; that they were non-residents at the time the note was executed, and have been, ever since, residents of the State of Texas; that the notes were executed in Texas and that the property held by them is not subject to execution.

In short, the petition shows that appellant has been unable to collect the Gray notes. The appellees, in the first paragraph of their answer, controverted some of the alle-

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gations of the petition, but, however, not denying that the Grays were non-residents when the notes were executed and had been since the execution thereof, and that they had no property subject to execution.

In the second paragraph of the answer it is claimed that under the judgment against Perrin, he was charged with all the money which came into his hands as guardian; that Perrin claimed in the action, credit for the Gray and May notes, which was disallowed and did not enter into the account in making up the judgment rendered against Perrin. In the third paragraph of the answer, appellees allege that the appellants, as heretofore stated, sued them and recovered judgment for the several amounts adjudged against Perrin; that the judgment has been almost satisfied; that appellants collected the May notes amounting to seven hundred and eighty dollars and ninety-three cents and credited it on the judgments; that appellants had collected three hundred and seven dollars and ninety-five cents interest on the Gray notes and credited that on the judgments and pleads the judgments recovered against the appellees, and the act of crediting the judgments with the May notes and interest collected on the Gray notes, as a bar to appellant's right to recover in these cases. .

It is also claimed in the third paragraph of appellee's answer that when they satisfy the judgments against them, then they are entitled to the Gray notes, and that they be adjudged to them. Plaintiff filed a demurrer to the answer, and on consideration thereof, the court overruled the same, but sustained it to the petition. Appellants refusing to reply, the court dismissed the petition, from which action of the court this appeal is prosecuted.

The court below must have proceeded upon the theory that the judgment against Perrin did not reserve any right

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in the appellants to the Gray and May notes, or if it did, it was lost by a recovery against the appellees for the amounts which the court adjudged against Perrin. Neither of which positions is tenable in the light of the record. It is perfectly manifest from the commissioner's report that Perrin was credited with the Gray and May notes. Indeed it is clearly stated in the reports that he was so credited. Instead of having the cash to pay on the amounts which he owed his wards, he sought to do so in part by these notes. It is true, the court says he examined the cases as if there had been no reports, but says the "judgments do not differ widely from the findings of the special commissioner."

It is true that his judgments did not differ widely from the findings of the commissioner, because the court gave Minnie S. judgment for forty-six dollars and fourteen cents, more than allowed her by the report. Margaret R. was given judgment for two hundred and seventy-six dollars and ninety-eight cents less than was allowed by the commissioner, and Robert B. was given judgment for two hundred and ten dollars and twenty-seven cents less than the amount found by the commissioner. It was the evident purpose of the court to save Perrin's sureties if possible from the payment of the amount represented by the Gray and May notes, and that they should not be required to pay the sums represented by them until it was seen whether the parties owing them would pay them, the court recognizing that it would not be just to the wards to credit their guardian with such sums without reserving the right in the wards to assert their claim to such sum upon failure to collect the notes which represented them.

The appellants were making claim against Perrin for the amount of these notes, or, rather, controverting the right of Perrin to a credit for the amounts thereof. This court said

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in its judgment that they were "not charged to the defendant in making up the judgment."

This is true, because they had been credited to Perrin in making up the judgment. If they had been charged to him in that judgment, or to use another way in stating the matter, by saying had they or the amounts thereof not been credited to Perrin, then the amount due each ward would have been increased nearly two thousand dollars. The chancellor used the word charge in contra-distinction to the word credit, as used in the report of the commissioner with reference to the notes in question. As a matter of fact they were not charged to Perrin.

If, as contended by appellees, the notes were not taken into account in making up the judgment, and, therefore, belong to them, why did the court further say in the judgment "the plaintiffs (appellants) may, hereafter, *make claim on account of said notes, if they are not collected.*"

If the claim growing out of the notes was fully settled by the judgment, why did the court reserve appellants' right to make claim on account thereof, if not collected?

We have not the slightest doubt that the court did reserve the right in the appellants to assert claim on account of their notes, if they were not collected.

If this was not true, the chancellor, whose duty it was to protect the estate of infants, would have made doubtful the preservation of over five thousand dollars of their estate, if not caused absolutely the loss of that amount to the wards.

It appears, from the petition, that the Grays were, when the notes were executed, and are now, non-residents of the State. If it be true that they were given for part of the wards' estate, and not for an individual debt of Perrin, though payable to him as guardian, then the sureties in his

bond as guardian are liable to the wards for the amounts thereof with interest properly computed.

Section 18, article 2, chapter 48, General Statutes, reads as follows: "Resident guardians shall not remove out of this Commonwealth any of the property of their wards, without first obtaining the sanction of a court of chancery jurisdiction, held in the county in which the guardian was qualified, and such court, upon petition sworn to by the guardian, and such proof as may be deemed necessary, may authorize the removal of the property of the ward out of this Commonwealth, upon such terms and conditions as may be equitable and just, and as will secure and protect the rights and interest of the ward. Guardians may be restrained from the unlawful removal of the property of their wards or any part thereof, out of this Commonwealth, upon the petition of the ward by next friend, or upon the petition of any surety of the guardian in his bond as such."

This provision of the statute was enacted to protect wards and the sureties on the bonds of guardians. If any surety of the guardian in his bond was made aware of the intention of the guardian to remove his ward's property from the State without the sanction of a court of chancery jurisdiction, he had the right to proceed to have such guardian restrained.

The policy of the law was to keep the property of their wards within the jurisdiction of the court, that the rights of wards may be protected, and their property preserved. This section has reference to notes, bonds, money, personal property, in fact every species of property which may lawfully come to the hands of a guardian.

If a guardian removes such property from the State without the sanction of a court of chancery jurisdiction, his sureties on his bond as guardian become liable on his failure

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to account therefor. The wards are not compelled to go into another jurisdiction to try to recover their estate. If the guardian fails to account for it his sureties must do so.

There is an immaterial issue attempted to be raised by the pleadings. Appellants claim the notes were executed in Texas. Appellees claim they were executed in Kentucky. It is wholly immaterial where they were executed. If executed in Kentucky by non-residents for some part of the estate of the wards, it amounts to a removal of so much of the property from the State.

If the notes had been executed for money by non-residents of the State, the effect is to remove that much property from the State. It does it as effectually as if the guardian had carried it out of the State and loaned it to non-residents of the State.

It is insisted that the judgments against the appellees, and the fact that appellants credited the judgments with the May note and some interest collected on the Gray notes, bars a recovery in these cases.

This contention is without merit.

In the judgment which it is claimed bars a recovery in these cases, language appears as follows, to-wit: "This judgment by agreement of parties is in no way to affect the claims of the plaintiffs, or either of them, in any action or actions that they or either of them upon the notes or either of them may have or may hereafter bring against defendants or either of them upon the notes, or either of them, known as the Texas notes, nor is this judgment in any way to estop, prevent or preclude the defendants from claiming and asserting their rights to said notes upon the satisfaction of this judgment, either in suits pending or any that may hereafter be brought, or any other defense they may have thereto."

To quote the foregoing seems to be a sufficient answer to

the contention that the judgment bars a recovery. It expressly reserves such rights as either party had under the judgment against Perrin rendered by the chancery court.

We can not agree with counsel that giving credit for the May note and the interest on the Gray notes estops appellants from asserting claim to the amount of the Gray notes.

As heretofore stated, Perrin received credit in the first judgment for the May note. When the sureties in his bond were again credited therewith, it was twice giving credit therefor, and it was an error to do so to the prejudice of the wards.

The effect was the same in giving credit on the judgment against the sureties for the interest collected on the Gray notes. The condition of the items just mentioned was the same as the Gray or Texas notes. Because two errors in the matter of credits were committed against the wards amounting to nearly \$1,100, is no reason why the court should now deprive them of several thousand more.

While this court regrets that the unfaithfulness of a guardian causes great loss to his sureties, still the bonds required of guardians are the only protection which the law affords infants.

The demurrer to the answer should have been sustained, and the court erred in sustaining it to the petition.

Judgment reversed, with directions that further proceedings be had consistent with this opinion.

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CASE 102—PETITION ORDINARY—JUNE 20.

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APPEAL FROM MONTGOMERY CIRCUIT COURT.

1. **LIABILITY OF PRESIDENT OF BANK FOR FALSE STATEMENT AS TO CONDITION OF BANK.**—In an action against the president of a bank to recover damages on account of plaintiff's purchase of shares of the bank from the defendant, who acted as agent for another in making the sale, the plaintiff alleging in her petition that she was induced to make the purchase by false statements made by defendant as to the condition of the bank, materially affecting the value of the stock, an instruction telling the jury that they could not find for plaintiff unless the statements were made by defendant with knowledge of their falsity, was more favorable to defendant than he was entitled to have, in that his liability was not, as it might have been, made to rest on any constructive knowledge or imputed knowledge by reason of his position as president, but was made to rest alone upon his actual knowledge. But the court having so held in behalf of defendant, it was proper to apply the same standard to plaintiff's agent, who was a director of the bank, which the court did by telling the jury that plaintiff could only recover on these statements, provided her agent, who made the purchase for her, did not at the time know or believe these statements to be untrue. The fact that he would, if he had exercised proper diligence, have known the statements to be false is not, under the circumstances, sufficient to prevent plaintiff from recovering.
2. **SAME.**—Even if the rights of the parties were to be determined by a question of diligence only, still the plaintiff's agent would have the presumption of law in his favor, as a higher degree of diligence is required of a president of a bank than of the other directors.

WOOD & DAY FOR APPELLANT.

1. The court should have told the jury to find for defendant on the ground that Tyler being a director of the bank was held to notice of its condition. (Boone on Law of Banking, sec. 85; United Society of Shakers v. Underwood &c., 9 Bush, 609.)
2. Where the means of knowledge are at hand and a party fails to avail himself of them, he can not maintain an action for deceit. (Cooley on Torts, p. 477; Bigelow on Fraud, p. 522; Wallace v.

97	748
108	158
97	748
116	401
97	748
116	401
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1126	756

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Gerson, 13 Wall., 627; Fulton v. Hood, 75 Am. Dec. 664; Rock-fellow v. Baker, 80 Am. Dec. 624; Cole v. Cassidy, 52 Am. Rep., 84; Mamlock v. Fairbank, 32 Am. Rep., 716.)

WM. H. HOLT ON SAME SIDE.

1. Not only is the knowledge that the law charged Tyler with chargeable to appellee, but she is chargeable with the means he had at hand to ascertain the truth or falsity of the alleged representation. And as the means of knowledge were equally available to Tyler as to Trimble, appellee can not complain. (Slaughter's admr. v. Gerson, 13 Wall., 379; Bell v. Byerson, 77 Am. Dec., 142.) Prewitt v. Trimble, 92 Ky., 176, and Day &c. v. Cunningham, 14 Ky. Law Rep., 112, distinguished from this case.
2. The error of the court in sustaining demurrer to the second and third paragraphs of the answer prevented appellant from presenting his side of the case to the jury. And even though the instructions were as favorable as he was entitled to, still that did not cure the error in sustaining demurrer to his defense, as he was thus precluded from proving the facts alleged.

TYLER & APPERSON FOR APPELLEE.

1. There is really but one question in this case, and that is whether the fact of Tyler, appellee's agent, being at the time of the purchase of the stock from appellant also a director in the bank, alters the law as laid down in Prewitt v. Trimble, 92 Ky., 176, and Day v. Cunningham, 14 Ky. Law Rep., 112.
2. A man may act upon a positive representation of facts notwithstanding the fact that the means of knowledge were specially open to him, or though he had legal notice. (Bigelow on Fraud, p. 523.)
3. The principal is held only to have *constructive* knowledge of such facts as are in the *actual* knowledge of the agent at the time of the transaction. The agent must have such knowledge as can be *communicated* to his principal, and *imputed* knowledge can not be communicated. (Mechem on Agency, secs. 718, 721; Distilled Spirits Case, 11 Wall., 171; Willis &c., v. Valette, 4 Met., 186; Trentor v. Pothan, 24 Am. St. Rep., 225, and notes; Ford v. French, 72 Mo., 250; 7 Atl. Rep. (Pa.), 145; 1 Am. & Eng. Ency. of Law, 422; Bigelow on Fraud, 240.)
4. From the fact that appellant is held to constructive knowledge of the condition of the bank it does not follow that Tyler is also held to such constructive knowledge. A higher degree of diligence is required of the president of a bank than of the other di-

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rectors. (Brannin & Co. v. Loving, 6 Ky. Law Rep., 331; Savings Bank of Louisville's assignee v. Caperton, 87 Ky., 314.)

JUDGE GRACE DELIVERED THE OPINION OF THE COURT.

This is an appeal by J. G. Trimble from a judgment against him, rendered in the Montgomery Circuit Court, for eleven hundred dollars, in favor of Mrs. E. C. Ward.

This judgment was rendered upon a petition filed in that court by Mrs. Ward alleging, in substance, as follows:

That on the 15th of July, 1887, she purchased of the defendants, J. T. Day and J. G. Trimble, twenty shares of stock of the Exchange Bank of Mt. Sterling, Ky., at the sum and price of one hundred and twenty dollars per share. That at the time of this purchase J. G. Trimble was, and for some years prior had been, the president of said bank, and that at the time of this sale Trimble exhibited to her agent, M. S. Tyler, who made this purchase, the last semi-annual statement, published by said bank, of date June 30, 1887, showing the condition of this bank at that date; its assets, including its loans and discounts, overdrafts, surplus, undivided profits, etc., as well as its liabilities. And that Trimble then represented that statement to be correct, stating that all its bad debts had been charged off, except a very small amount, affirming it to be the best bank in Eastern Kentucky, and that its assets were worth dollar for dollar.

Plaintiff further charges that she did not know the true financial condition of said bank, nor had she any other means of ascertaining same, other than from the published statements of said bank; and that in making this purchase she relied upon these statements, both by the bank and the personal statement of defendant, Trimble, as being true.

Plaintiff further charges that said bank statement was

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incorrect, and false, and that defendant Trimble's statements were not true, and that defendant Trimble knew at the time that they were incorrect and untrue.

That in fact the solvent resources of said bank were not as much by thousands of dollars as shown by this statement, that it really had no undivided profits, and that the stock of said bank was not then really worth more than sixty-five dollars per share.

Plaintiff says by reason of these false and fraudulent statements, she was induced to make the purchase and that by reason thereof, she has been damaged in the sum of eleven hundred dollars.

Defendant Day was not brought before the court.

The defendant Trimble filed his answer, denying all the material allegations of the petition.

And on a trial by a jury the verdict was for the plaintiff in the amount stated.

In addition to the denials filed by Trimble, he also set up in his answer that M. S. Tyler, the agent of plaintiff, who made this purchase, was also a director in said bank at the time that he signed the statement of June 30, 1887, and that said Tyler had ample opportunity to know the condition of said bank.

It will be observed that defendant Trimble being at most only the agent of defendant Day in negotiating the sale of this stock, and having at the time of the sale disclosed his principal, and having no interest in this sale, he can only be held liable in an action for deceit, the essential elements of which are a false and fraudulent statement of the condition of said bank. And that Trimble had knowledge, either actual or constructive, that the statements were untrue at the time he made them.

The petition is framed on this line, making these averments.

The same line of liability was likewise submitted by the court to the jury in an appropriate instruction, same being as follows: "The court instructs the jury that if they believe from the evidence that about July 15, 1887, the defendant, Trimble, as agent for his co-defendant, Day, sold and transferred to the plaintiff, through her agent, Tyler, twenty shares of stock in the Exchange Bank at Mt. Sterling, Ky., at the price of \$120 per share, and that at the time of the sale of said stock, or during the pendency of the negotiation for the sale of same, the defendant Trimble referred to the published statement of the bank of date of June 30, 1887, in which the resources of said bank were stated. . . . And represented and stated to plaintiff's agent, that said bank statement was correct, and that all the bad debts had been charged off, except a small amount, and that the assets were worth dollar for dollar; and if they further believe from the evidence, that said statements and representations were made to plaintiff's agent, with the intention that plaintiff's agent should rely on same, and that he did rely on them in making the purchase; and if they further believe from the evidence that said statements, if made, were untrue, and were known and believed by Trimble to be untrue, to a material extent, either that the assets were not worth dollar for dollar, or in any other respect, which, in a material degree, decreased the amount of the good and solvent assets of said bank, or increased its liabilities. And said statements were not known to or believed by plaintiff's agent to be untrue at the time of the purchase of said stock, then they should find for the plaintiff, the difference, if any, between the value of the stock bought by plaintiff, through her agent at the time of the sale, if said statements were

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false, and its value at the time of the sale if said statements and representations had been true, not exceeding eleven hundred dollars. And they may or may not, in their discretion, give interest at the rate of six per cent. per annum from the time of the sale.

2d. Unless the jury believe, from the evidence, that the defendant made the statements and representations, as set out in the first instruction, at the time of the sale, or during the pendency of the negotiation for a sale, and that said statements or representations, as made, were untrue and known or believed by defendant to be untrue, then they should find for the defendant.

Thus it will be seen that the court below made the liability of defendant Trimble depend solely on the two facts: First, as to whether these statements and representations, if made, were untrue in point of fact, and whether the defendant knew them to be untrue at the time they were made. There was no confusion and no uncertainty in the law, as submitted by the court.

The liability of the defendant was not made to rest on any constructive knowledge, or any imputed knowledge, by reason of the position as president, which he occupied, but upon his actual knowledge. And this exposition of the law was, we think, more favorable to the defendant than the court, under the facts, would have been authorized to lay down.

But, having so held, in behalf of defendant, it was quite proper that only the same rule or standard should be applied to plaintiff's agent, Tyler. And this was done by the court in saying to the jury that plaintiff could only recover on these false statements, provided, Tyler, her agent, did not, at the time, know or believe those statements to be

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untrue. That this would have defeated a recovery by plaintiff.

And the jury, when this question of actual knowledge was submitted to them by the court, as to both parties—Trimble, as agent for his son-in-law, Day, in making the sale, and Tyler as agent for his kinswoman, Mrs. Ward—found that Trimble had this knowledge and Tyler did not, and the damage being clear, they found for plaintiff.

If this were a question of diligence only, whereby the rights of these parties were to be determined, as we think it is not, yet in this, plaintiff's agent would have the presumption of law in his favor.

This court has held in cases *Brannin & Co. v. Loving, etc.*, 6 Ky. L. R., 331, and *Savings Bank of Louisville's Assignee v. Caperton*, 87 Ky., 314, that a higher degree of diligence is required of a president of a bank than of the other directors. And he stands in a different attitude, even where there is no evidence of *mala fides* on his part, and no motive of personal gain can be imputed to him.

So that, it would not be at all consonant to justice or authority, where actual knowledge has been required to be shown before the defendant can be held liable, thus to assert that if plaintiff's agent had been guilty of negligence only, and did not, in fact, know as much about the actual value of this stock as he should have known that, therefore, the court or jury would punish his client, who is confessedly ignorant of all these matters, by compelling her to take and accept the stock in this bank at a price nearly double its value.

We have just reversed two cases, at the instance of appellant from the same court, because the court did not submit this question of knowledge of these errors and false statements to the jury for their consideration. And now

Trimble v. Ward.

when we find, as in this case, that it was properly submitted, and found against him by the jury, we are constrained to hold that the law has been correctly administered in this case. And that while the court would not suffer defendant Trimble to be presumed guilty, simply because he was president of the bank, neither will it presume or instruct the plaintiff out of court, simply because Tyler, plaintiff's agent, was a director in this bank.

This rule must, in these cases, work both ways.

Upon this question of notice on the part of Tyler, and of the effect of same, and of knowledge imputed to him, counsel for both sides quote from Mr. Bigelow on Fraud. By appellant this author is quoted, p. 522, as saying: "All the cases upon this aspect of the subject fall, as before, under the 'means of knowledge.' It has, indeed, been laid down as a broad proposition of law, that if the means of knowledge be at hand and equally available to both parties, and the subject of the transaction be open to both alike, the injured party must avail himself of such means, if he would be heard to say that he was deceived by the representation of the other party, unless there was a warranty of the facts."

And, yet, this same author is quoted by counsel as saying on the next page, 523: "But there is serious ground for doubting the correctness of this proposition in its broad form Recent authority has, however, gone far towards setting the matter right in principle. The proposition has now become largely accepted, at law as well as in equity, at least as general doctrine, that a man may act upon a positive representation of facts, notwithstanding the fact that the means of knowledge were specially open to him, or though he had legal notice, as, for example, in the public registry, of the real state of things. If the representations were of a character to induce action, and did induce

it, that is enough; for it is not just that a man who had deceived another should be permitted to say to him, 'You ought not to have believed or trusted me,' or, 'You, yourself, were guilty of negligence.' This, indeed, appears to be true, even in cases in which the injured party had, in fact, made a partial examination."

Here, this author may be said to get back to sound principle of good faith and honest and fair dealing between man and man, and, practically, to ignore the idea that because a man may have been guilty of some negligence, and may not, in fact, have the knowledge of the transaction that he ought to have had, yet he may be regarded fairly within the law, as a legitimate and helpless subject of imposition and wrong.

The view taken by the court below was the correct one, making the validity of this transaction depend upon the actual knowledge of each, and on a submission on this line the jury found that appellant had the knowledge of the untruth of these bank statements, and that Tyler, the agent of appellee, did not. In fact, it is almost impossible to conceive that Tyler did, in fact, have this knowledge of the falsehood in this bank statement, to the extent developed by the evidence, showing this stock to have been worth but little over half the contract price, and yet that he bought same at \$120 per share, for his kinswoman. Such conduct, if possible to conceive, would border closely on the criminal side of the law.

The jury evidently did not believe the imputation as to Tyler. And while the general doctrine, "that the knowledge of the agent may be imputed to his principal," is doubtless correct, yet here the very thing in issue. "the knowledge of the agent" was found not to exist. So that there was nothing, in fact, to be imputed to his principal.

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Another objection is made, that the court below erred in sustaining a demurrer to the second and third paragraphs of defendant's answer. We perceive no error. They were at best only repleading what was sufficiently pleaded in the first paragraph, or reciting evidence which could properly have been heard, and which was, in fact, heard, on the trial, under the general issue formed by the denials in the first paragraph of the answer. We perceive no error in this case authorizing its reversal.

Wherefore, the judgment is affirmed.

*CASE 103—PETITION EQUITY—JUNE 21.

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APPEAL FROM FARREN CIRCUIT COURT.

1. **SUBMISSION BY PLAINTIFF UNDER MISTAKEN BELIEF THAT NO ANSWER HAD BEEN FILED.**—This equitable action to enjoin the collection of a judgment having been submitted on motion of plaintiff when no reply had been filed the chancellor did not abuse his discretion in overruling plaintiff's motion to set aside the submission, although it was supported by the affidavit of his attorneys to the effect that they did not know when they asked the submission that an answer had been filed. It is immaterial that the answer, which was due on the third day of the term at which it was tried, was not filed until a later day, as it was then filed in open court without objection.
2. **INJUNCTION.**—While the fact that the grounds as set forth in the petition are insufficient to justify the injunction should properly have been taken advantage of by a motion to dissolve the injunction, still it was a proper matter to be considered by the court in disposing of the case as it did.
3. **SAME.**—The negligence or improper conduct of an attorney employed to defend a suit at law, or his failure or neglect to defend the action, will not justify an injunction against the judgment.
4. **DEPUTY CLERK CAN NOT GRANT INJUNCTION.**—The power conferred by sec. 273 of the Civil Code of Practice upon the clerk of the circuit court to grant an injunction is judicial in its nature, and can

*With this case as re-published in 31 L. R. A., 33, is an elaborate note upon the subject of injunctions against judgments.

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not therefore be exercised by a deputy. The provision of sec. 678 of the Civil Code that "any duty enjoined by this code upon a ministerial officer may be performed by his lawful deputy" was intended to include only duties which are ministerial in character and such as are to be performed by the officer in his ministerial capacity. The power conferred upon the clerk to grant injunctions is not analogous to the power conferred upon him to issue attachments, which may be done by a deputy.

CARR & MORRIS FOR APPELLANT.

1. The court erred in refusing to set aside the submission, and in arbitrarily assessing damages against appellant without the introduction of any proof or any opportunity being given to introduce proof on the question. (*Mallory v. Daubeis' exors.*, 83 Ky., 239.)
2. The deputy clerk had authority to issue the injunction. (Civil Code, secs. 273, 678.)

LEWIS McQUOWN FOR APPELLEE.

1. A new trial or an injunction against a judgment will not be granted on account of the neglect of the agent or attorneys of the party applying for it. (*Patterson v. Matthews*, 3 Bl./, 80; 1 High on Injunctions (3d Ed.), secs. 210, 216.)
2. The deputy clerk had no power to grant the injunction, and the fact that it was granted by him is fatal to its validity. (19 Am. & Eng. Enc. of Law, 461, 478; *Commonwealth v. Jones*, 10 Bush, 749; Civil Code, sec. 273.)

Section 678 of the Civil Code refers only to the performance of ministerial duties. (Civil Code, sec. 562; *Hartman's adm'r v. Hartman*, 15 Ky. Law Rep., 368.)

3. Even if the deputy clerk has the same power to grant an injunction that his principal has, the principal has no such power unless the judge of the court is absent from the county, and as that fact does not appear from the petition it was proper for that reason to dissolve the injunction. (*Jacobs' adm'r v. L. & N. R. Co.*, 10 Bush, 263.)
4. The affidavits filed disclosed no cause for setting aside the order of submission.

JUDGE EASTIN DELIVERED THE OPINION OF THE COURT.

This equitable action was brought by appellant, in the Barren Circuit Court, against appellee and the sheriff of Hart county, Kentucky, for the purpose of enjoining the

levy and collection of an execution then in the hands of said sheriff, and which had been issued on a common law judgment rendered by the said Barren Circuit Court in favor of appellee against appellant.

It is, in substance, alleged by appellant in his petition, that he was employed by one Mary E. Burks, administratrix of John Burks, deceased, to aid her in collecting the assets and paying the debts of the estate of her intestate, and that, while so engaged, he accepted an order given on himself by the said administratrix to appellee, with the understanding that he was to pay it out of funds that he might collect for the estate of said intestate and not otherwise, and that the execution sought to be enjoined was issued on a judgment rendered in an action at law brought by appellee against him on this accepted order. It is further alleged that he had not, at the time said suit was brought, nor at any time after the acceptance of the order, any money or assets belonging to the estate of said Burks in his hands with which to pay said order, or any part thereof; that, upon being served with process in the action, he went to Glasgow and laid these facts, together with the fact that he was in no way individually liable on said claim, before a practicing attorney of that bar, whom he requested to prepare and file an answer for him in the action, and who promised and agreed to do so; that, supposing that this would be done, and supposing that the action would thereupon stand continued for that term, he then returned to his home in Hart county, Kentucky, but that, for some reason unknown to him, the said attorney failed to file the answer or make defense for him, and the appellee wrongfully and fraudulently took the judgment against him on which the execution sought to be enjoined was issued.

The petition further charges that Lewis McQuown, who,

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as administrator of W. H. Botts, deceased, is appellee herein, and who recovered said judgment against appellant, is also the attorney for the estate of said John Burks, deceased, and, as such, has directed parties indebted to said estate not to pay their indebtedness to appellant, but to pay to another, and that, in consequence thereof, appellant will never be able to collect anything more belonging to said estate or to pay the demand of appellee, and concludes with the usual averment that, unless an injunction be issued, his individual property will be levied on and sold, and he will be subjected to great and irreparable loss and injury.

On the day on which this petition was filed, to-wit, August 24, 1893, and without notice to appellant, an order of injunction was entered, and an injunction as prayed for was issued, restraining the sheriff from levying said execution on the property of appellant, and from taking any further steps thereunder, until the further order of the court, which was in due time executed upon said sheriff.

At the succeeding term of the court, not, however, on the third day of the term, which commenced on the third Monday in November, but on the 13th day of December, 1893, appellee filed an answer controverting all the allegations of the petition and pleading affirmatively the facts attending the giving of the order on appellant by Mrs. Burks and its acceptance by appellant. That order, with the acceptance thereon, is made a part of the answer and shows on its face that it was drawn on appellant and accepted by him individually, and without qualification, as to the manner in which or the fund from which it was to be paid.

No motion was made to dissolve the injunction, no reply was filed or offered to be filed to this answer, no proof was taken by either party, but, at the next term of the court, to-wit, on March 12, 1894, it appears, singularly enough, in

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view of the state of the record, that the action was submitted for judgment *on motion of appellant*. On the next day, March 13, 1894, appellant moved to set aside the order of submission, and, in support of that motion filed the separate affidavits of the two attorneys who were representing him in the case. On the 17th day of March, the court below overruled this motion to set aside the submission, dismissed appellant's petition and dissolved the injunction, with damages at the rate of ten per cent. on the amount of the execution enjoined and costs, and from that judgment this appeal is prosecuted.

The principal question to be considered is whether or not the motion to set aside the order of submission was properly overruled. The statements of the affidavits of counsel filed in support of this motion, practically amount to but little more than the statement of each of these gentlemen that he did not know that an answer had been filed, at the time the order of submission was entered. It is true that one of these affiants says, "that if he was present in court on the day said answer was offered and filed, that he did not hear said motion; and said answer was not in the papers of said suit when the November term ended," but he does not say how he knows this, or that he ever inquired for or looked at the papers of the case to see whether or not an answer had been filed. The other affiant says that he was detained from court by sickness during several days of the November term, but that "in a few days after said last term," he looked through the papers in the suit and that there was then no answer among them. This must have been in December, and he does not pretend ever to have made any further investigation, though nothing further was done in the case until the 12th day of March following,

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when the case was submitted for judgment, either on his motion or the motion of his partner.

Both affiants lay much stress on the fact that appellee's answer was due on the third day of the November term, and that no order was made extending the time for filing same. But it is not pretended that any agreement was made that one should be filed at a later day in the term, nor does it appear that appellant or his counsel were in any way led to believe that none would be filed, but, on the contrary, it does appear that this answer was filed, without objection, in open court, on the 13th day of December, at that same term of court.

One of appellant's counsel says in his affidavit that he is informed that his client is at that time at home with a sick wife, and this may account in some measure for the fact that, although counsel discovered on March 13th that the answer had been filed and the motion to set aside the order of submission was not considered until March 17th, yet no reply controverting the allegations of the answer was tendered or filed, and no proof offered to sustain the averments of the petition. But, however this may be, we are unable to find anything in either of these affidavits sufficient to explain or overcome the fact that this answer was allowed to remain in the record uncontroverted from December 13, 1893, or to rebut the conclusion that, by the exercise of ordinary diligence, counsel could and would have discovered this fact before they voluntarily entered the order of submission on March 12, 1894. Upon these considerations alone it seems to us that the chancellor might, as he did, in the exercise of a reasonable discretion, have refused to set aside the order of submission.

But, in support of the action of the court below, in overruling this motion and dismissing the petition, another very

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potent consideration is found in the fact that the grounds, as set forth in the petition on which this injunction was asked, are insufficient to justify it. We are aware that this could and perhaps should properly have been taken advantage of by a motion to dissolve the injunction, and that no such motion was made, but still it is not to be entirely excluded on this motion made after the entire case had been submitted for judgment.

This injunction was asked, as above stated, against a common law judgment, on the ground that appellant had requested an attorney, to whom he had submitted the facts constituting his defense, to prepare an answer for him, that he had relied upon this attorney's promise to do so and had gone to his home in another county, supposing that his answer would be filed and the case be continued, but that, for some reason unknown to him, the attorney had failed to file the answer. This, in our opinion, is wholly insufficient to entitle appellant to relief by injunction against a judgment by default rendered against him under such circumstances. Aside from the personal negligence thus confessed on part of appellant himself, in going off to another county and never looking after his case, in which, as we understand, the default judgment was not rendered till the second term after process was served, is the fact that the gross and unexplained negligence which he thus charges upon his attorney, instead of excusing him, is, under the law, to be treated as his own negligence.

This doctrine was laid down in one of the early decisions of this court, and, so far as we are aware, has not been materially modified or departed from.

In *Patterson v. Matthews*, 3 Bibb, 80, this court said: "It is a settled rule that a new trial ought not to be awarded on account of the neglect of the agent or attorney of the

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parties applying for it; for such neglect is equivalent to the neglect of the party himself, and he may have a remedy over against his agent or attorney."

And, in considering this exact question, Mr. High lays down the rule in this language, to-wit:

"The negligence or improper conduct of an attorney employed to defend a suit at law, or his failure or neglect to defend the action, will not justify an injunction against the judgment." 1 High on Injunctions, sec. 210 (3d Ed.)

This being the law, the question of the validity or invalidity of the defense which might have been made to the action, becomes wholly immaterial, and it is, therefore, unnecessary to consider the question how far appellant could have availed himself of the defense; that it was understood that he was not to be individually bound on this accepted order, but was only to pay it out of funds collected for John Burks' estate, when, by the terms of the writing itself, the obligation was personal and unqualified. No matter what his defense may have been, having failed, either by his personal negligence or that of his attorney, to answer or make defense, he was not entitled to the relief sought in this action; and, although no motion was made to dissolve the injunction on this ground, yet it was a proper matter to be considered by the court below in disposing of the case as it did.

There is still another question pertaining more directly to the validity of this order of injunction, and which might properly have been raised on a motion to dissolve, but which might also properly have been considered by the court on the hearing, and that is the fact that this injunction was granted by the deputy clerk of the Barren Circuit Court. The order is signed "Jas. B. Martin, C. B. C. C., by J. H. Bohannon, D. C."

Has a deputy clerk power to grant such an order? The clerk certainly has this power, under certain circumstances, as it is provided in section 273, Civil Code of Practice, that "the injunction may be granted at the commencement of the action, or at any time before judgment, by the court, or by any circuit judge, or by the clerk of the court, or the county judge, if the judge of the court be absent from the county; or by two justices of the peace, if the judge and the clerk of the court and the county judge be absent from the county." And, if the exercise of this power to grant injunctions were merely ministerial in its character, it would be conceded that the power thus conferred on the clerk might be exercised by his deputy. By section 678 of the Civil Code of Practice, it is provided that "any duty enjoined by this code upon a ministerial officer, and any act permitted to be done by him, may be performed by his lawful deputy." But this language, in our opinion, in referring to duties to be performed, and acts permitted to be done, by a ministerial officer, is intended to include only duties and acts which are ministerial only in character and such as are to be performed and done by the officer in his ministerial capacity. When, however, a ministerial officer, or one whose general duties are of that character, is clothed, in special cases, as may be done, with the power to perform acts in their nature judicial or *quasi* judicial, we do not think it was the purpose or intention of the legislature, by this section of the code, to authorize the performance of such acts by a deputy. The clerk of a court is, strictly speaking, a ministerial officer, but that this power of granting injunctions, conferred upon him by the section referred to is, in its nature, not purely ministerial, but is judicial or *quasi* judicial, seems to us manifest, and that it can not be delegated, either by him or any of the other officers upon whom it is conferred, either to a special

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or a regular deputy, seems equally manifest. It is not analogous to the power conferred upon him to issue attachments, which may be done by a deputy. There he is required to see that an affidavit in a special form, prescribed by law, is filed. But here, where an immediate order of injunction is asked for without notice, as was done in the case before us, it is expressly provided by sec. 276 of the code, that it shall not be granted "unless the court or officer, to whom the application is made, *shall be satisfied*, by the affidavit of the applicant or by other evidence, that irreparable injury will result to the applicant if the injunction be not immediately granted." This requirement clearly demands investigation and consideration judicial in its character. He is to consider and determine, as a *quasi* judicial officer at least, the sufficiency of the application, in law and in fact under the evidence presented, before granting the order.

In defining judicial power this court has said:

"We regard it as an indisputable proposition that where the inquiry to be made involves questions of law as well as fact, where it affects a legal right, and where the decision may result in terminating or destroying that right, the powers to be exercised and the duties to be discharged are essentially judicial." *Commonwealth v. Jones*, 10 Bush, 749.

All the elements entering into this definition of judicial powers seem to us to exist in this power of granting injunctions. But the language of the section conferring this power, as well as the fact that it is conferred on no others except those whose functions and duties are strictly judicial, seems to us conclusive that this power is intrusted to the clerk personally, that it is in its nature judicial, and is one that can not be delegated. By the language of the provision itself, the power is given to the clerk, and not to his

deputy; it certainly involves the exercise of discretion and judgment, and, under the general rule governing such powers, the person to whom they are delegated and in whom the trust is reposed, can not delegate or intrust their exercise to the judgment and discretion of another. In a certain contingency, the clerk may grant an injunction, and, if the judge, the clerk and the county judge be absent from the county, then two justices of the peace may grant the injunction. If it had been contemplated that the deputy clerk, in any state of case, should have this power, the law would have conferred it, in the event of the absence of the clerk from the county, as it must be presumed that the clerk would leave a deputy in charge of his office, and would have said that, if the judge and the county judge and the clerk and *all his deputies* are absent from the county, then the two justices may act.

We can not believe that it was ever intended to intrust so important a function, involving, as it necessarily does, the exercise of judicial discretion, to every deputy clerk in this Commonwealth, many of whom are wholly without experience, and who, under the laws of this State, may even be under the age of twenty-one years, and we think, therefore, that the injunction issued in this action was invalid, and should have been dissolved, for the additional reason that it was issued by a deputy clerk.

We are of the opinion that the court below properly dissolved appellant's injunction and dismissed the petition with damages and costs, and that judgment is affirmed.

CASE 104—PETITION ORDINARY—JUNE 21.

Citizens' National Bank v. Hubbert, &c.

APPEAL FROM MONTGOMERY CIRCUIT COURT.

IMPLIED LIABILITY OF ASSIGNOR—DILIGENCE REQUIRED IN PROSECUTING MAKER OF NOTE.—The assignee of a note executed by a foreign corporation must obtain judgment and return of "no property" against the maker in the State where it was chartered, and where its property is, in order to hold the assignor liable upon his assignment. And the fact that the maker is insolvent, and that its property has been placed in the hands of a receiver, affords no excuse for the failure of the assignee to use this diligence.

In this case the maker of the assigned note being a Georgia railroad corporation with its entire line of road and principal place of business in that State, the assignee by suing the maker in proper time in the courts of Tennessee and obtaining judgment and return of no property there did not use that legal diligence that is required to recover of the assignors.

W. O. HARRIS AND WM. H. HOLT FOR APPELLANT.

There is no law which requires in all cases a suit against the maker in order to hold the assignor. What the law requires is due diligence to collect the money, and such diligence must usually be manifested by suit, but not always. One of the well-established exceptions to the rule is when the maker of the note is a non-resident. (*Simpson v. Daniel*, 1 B. Mon., 250; *Smallwood v. Woods*, 1 Bibb, 545; *Clay v. Johnson*, 6 Mon., 644; *Wood v. Berthund*, 4 J. J. Mar., 307; *Stapp v. Anderson*, 1 Mar., 540; *Tucker v. Fogle*, 7 Bush, 294; *Francis v. Gant*, 80 Ky., 193.)

2. When the maker is beyond the jurisdiction, or has been by some public or judicial action stripped of his property, it is a vain and useless thing to sue him, and therefore suit is not required. (*Roberts v. Atwood*, 8 B. Mon., 210; *Tucker v. Fogle*, 7 Bush, 294; *Stapp v. Anderson*, 1 Mar., 540; *Maupin v. Crompton*, 3 Bibb, 214; *Green v. Page*, 80 Ky., 368; *Eastin & Wilson v. Bierbower & Wilson*, MS. Op., Dec. 4, 1877; *Taylor & Beyers v. Daniel*, 9 B. M., 53.)

A receiver having been appointed to take charge of the property of the Empire & Dublin R. Co., his possession was the possession of the court, and judgment and execution would have been useless. (*High on Receivers*, sec. 141.)

3. The residence of a corporation is the residence of its president.

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(Sherrill v. C. & O. R. Co., 89 Ky., 302; Harper v. Newport News &c. Co., 90 Ky., 361.)

Therefore the suit against the Empire & Dublin R. Co. was properly brought where its president lived.

B. F. BUCKNER FOR APPELLEES.

1. The reduction of the maker of the note to insolvency by suit is necessary to fix the assignor's liability. (Smallwood v. Woods, 1 Bibb, 543; Trimble v. Webb, 1 Mon., 103; Clair v. Barr, 2 Mar., 255; Francis v. Gant, 80 Ky., 191; Brinker v. Perry, 5 Litt., 195; Bosman v. Akeley, 39 Mich., 710; Dwight v. Williams, 4 McLean, 586; Drave v. Schoolfield, 6 Leigh, 397; Ward v. Haggard, 75 Ind., 381.)
2. Suit must be prosecuted in the State in which the obligor resides unless he was out of the Commonwealth at the date of the assignment, and never returned, so as to be sued here, and such absence was unknown and therefore not contemplated by the assignor and assignee. (Burk v. Morrison, 8 B. M., 131; Levi v. Evans, 7 B. M., 115; McFadden v. French, 3 B. M., 121; Simpson v. Daniel, 1 B. M., 250.)

Cases explained: Clay v. Johnson, 6 Mon., 303; Wood v. Berthoud, 4 J. J. M., 307; Tucker v. Fogle, 7 Bush, 290; Bosley v. Taylor, 5 Dana, 159; Francis v. Gant, 80 Ky., 193.

CHIEF JUSTICE PRYOR DELIVERED THE OPINION OF THE COURT.

The Empire & Dublin Railroad Company made its note payable to the order of the Indianapolis Car & Manufacturing Company for \$4,250 in ninety days, at the Third National Bank in Chattanooga.

This note was indorsed by the payee and also by the New Albany Forge and Rolling Mill Company, and by Hubbert & Hubbert, who were accommodation indorsers, and at Hubbert's instance was discounted by the appellant, the Citizens' National Bank. The note is non-negotiable, but at the date of its maturity was protested for non-payment, and the Citizens Bank (the appellant) sought to make Hubbert & Hubbert, the appellees, liable as indorsers of the paper.

The facts show, beyond controversy, that the maker of the note (the Empire & Dublin Railroad Company) is a

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Georgia corporation, and that its entire line of road is in the State of Georgia, and that its principal place of business was, at the maturity of the paper, in that State. Its president lived in Chattanooga, Tennessee, and had an office and did business for the company in that city, but it is not shown or attempted to be shown that the obligor in the note had property of any kind within the State of Tennessee at the place or in the county where the note was made payable. It does appear that the maker was insolvent and that the road had gone into the hands of the receiver at the maturity of the paper.

The assignee of the note (the appellant) instituted an action on the note in the city of Chattanooga, had service on the president of the road, obtained a judgment upon which an execution issued and was returned *no property found*.

There never was a suit instituted where the maker of the note was chartered and where its property was, and the only question in this case is: "Did the assignee by suing the maker within proper time in the courts of Tennessee (Chattanooga) use that legal diligence that is required by law to enable it to recover of these assignors? If the mere insolvency of the obligor or the fact of the road having passed into the hands of a receiver will excuse the appellant from exercising the proper diligence so as to create a liability on the part of the assignor, then the judgment below was erroneous.

We are aware of but few exceptions to the rule requiring this extraordinary diligence in order to hold the assignee bound for the solvency of the maker. If, when a note is assigned to one in this State, executed by an obligor living in another State, the assignee is required to pursue the maker to insolvency in the courts of the State where he lives and his property is, then it results this judgment for

the assignor was proper. It is too well settled in this State to admit of controversy that the evidence of insolvency must consist of an execution with a return of no property so as to charge the assignor, and this execution must go to the maker's place of residence where his property is located.

In *Brinker v. Perry*, 5 Litt., 194, this court said: "In general, due and proper diligence by suit against the maker must be employed by the assignee to enable him to recover of the assignor. It is unimportant whether the declaration be understood to allege the fact of Moody, the maker of the note, having removed from the State, or only absented himself on a temporary occasion. In either case the principle is the same, and in neither case can there be a recovery against the assignor without due diligence by suit having been exercised against the maker.

"If the absence was merely temporary there was nothing to prevent him from suing the maker of the note, and if there was a permanent removal, as it was alleged to have taken place before the note was assigned, he must be understood to have undertaken to pursue the maker of the note by suit in the country to which he had removed before he can have recourse against his assignor."

The fact of the insolvency of the maker affords no reason for not taking every legal step to collect the debt.

In *Francis v. Gant*, reported in 80 Ky., 190, the cases on this subject were reviewed, and although Justice Hines dissented upon the ground that insolvency had been alleged and not denied, and this dispensed with the necessity of producing the evidence of due diligence by suit, yet he held, if the act of insolvency had been denied, proof of due diligence by suit was indispensable.

If the assignor can sue the debtor, wherever he finds him, without regard to his residence and location of his property,

in that event there would be but little use for the exercise of legal diligence, and it is also apparent that it would be inconsistent with the exercise of a reasonable judgment on the part of the assignee to sue the debtor in a place other than his residence and where he had no property, out of which the debt could be made.

In *Burk v. Morrison*, reported in 8 B.M., 131, the debtor, at the date of the assignment, lived in Christian county, but before the note fell due removed to Trigg county. It was held that a suit in Christian was not evidence of due diligence, but the debtor should have gone to Trigg and there prosecuted his action. In *Simpson v. Daniel*, 1 B. M., 250, Daniel assigned a note on Thompson & Chapman to one Simpson. The assignee sued the obligors in the Scott Circuit Court, and had a return of no property. The assignor pleaded in an action against him by the assignee that Thompson had continuously resided from the date of the assignment in the State of Mississippi; that his property was there, and the assignee knew that fact when the assignment was made. In the decision of that case the court said: "So if the payors of the note or either of them were residents of another State at the time, before and since the assignment, and that was known to the assignee, as the estate of the non-resident must be presumed to be where he resides, the return of *nulla bona* here, where he may happen to be served with process, can not create a presumption even that he is solvent, much less operate as conclusive evidence of that fact. We conceive, therefore, that to entitle the plaintiff to recover upon the implied assumpsit of the defendant, it was necessary for him to show the use of due diligence by suit, not only against Chapman in Kentucky, but against Thompson in Mississippi."

There has been no permanent removal from the State be-

fore the maturity of this note, or an absconding, leaving no property to pay it, as in the case of *Clay v. Johnson*, 6 Mon., 644, but here the maker was in Georgia, with all its property; was there when the note was assigned, with its property, tangible and intangible, and no reason given for not prosecuting the maker to insolvency in the courts of the State where the maker resides and its property is. It must be assumed that the assignee knew where the maker was given its charter and had its property, for, by the exercise of the slightest care or diligence, it could have ascertained that this corporation was in Georgia, and, therefore, when the appellant took this paper it assumed to exercise all the legal diligence required in order to protect the assignor against loss, and to retain the right to make the assignor refund, in the event such diligence was exercised.

In *Roberts v. Atwood*, 8 B. M., 209, the fact that the debtor had gone into bankruptcy was held to be an excuse for not suing, the debtor having been declared bankrupt a few days after the note matured, and in *Tucker v. Fogle*, 7 Bush, 290, where the assignee was attempting to exercise the diligence required by law, *he was intercepted*, as the opinion expresses it, by a proceeding under the act of 1856, and the insolvency of the debtor established in that case, to which the assignee was a party. It was held that the assignee could recover against the assignor.

In the case before us the only evidence is that the maker was insolvent and the road in the hands of a receiver. This can not excuse the appellant and is unlike the cases referred to. It does not appear that by any proceeding in the State of Georgia he was prevented from bringing his suit in that State, or that any impediment ever existed to his proceeding in the courts of Georgia to make this debt.

Judgment affirmed.

CASE 105—JUNE 22.

O'Mahoney v. Bullock, &c.

APPEAL FROM FAYETTE CIRCUIT COURT.

1. **CONSTITUTIONAL LIMITATION UPON INDEBTEDNESS OF COUNTIES.**—Sec. 157 of the constitution, in so far as it limits the indebtedness of counties and taxing districts, does not require legislation to give it effect. Therefore a county can not incur an indebtedness in excess of that limit without submitting the question to a vote of the people as provided in that section.
2. **REPEAL OF STATUTE.**—The local act passed May 3, 1890, authorizing the Fayette County Court to purchase turnpikes and issue bonds in payment therefor, has not been repealed either by the constitution or by the various provisions on the subject of turnpikes now found in the Kentucky Statutes.
3. **SAME.**—The principles determined in *Broadus v. Broadus*, 10 Bush, 299, have no application here. The book entitled "The Kentucky Statutes" is not a revision of the laws of the Commonwealth, but merely a collection of them, and each act speaks for itself with respect to its effect on prior acts.
4. **SAME.—TAXATION.**—The provision of sec. 171 of the constitution that "all taxes shall be levied and collected by general laws" does not render inoperative a local act providing for the levy and collection of taxes for a special purpose, for if that provision has any application to such a state of case, the General Assembly having since the adoption of the constitution provided by general laws how all taxes may be levied and collected in behalf of the various counties, these general laws may be considered as amending or repealing the special provisions in the local act.

W. P. KIMBALL FOR APPELLANT.

1. Secs. 157 and 171 of the constitution are self-executing and do not require legislation to render them operative or to put them in force.
2. Sec. 171, which provides that "All taxes shall be levied and collected by general laws," being self-executing, destroys the validity of the local act of May 3, 1890.
3. The act of May 3, 1890, authorizing the Fayette County Court to purchase turnpike roads in that county and maintain them free of toll to the travelling public is inconsistent with sec. 157 of the constitution, and the issuance of the bonds and increase of the reve-

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nue for the purpose of purchasing and maintaining such roads can not be made without submitting the question to the voters as is required by that section.

4. The fact that the general law passed by the General Assembly in regard to turnpike and gravel roads does not contain any provision similar to the provisions of the act of May 3, 1890, indicates that the said local act is repealed by the general one.

JOHN R. ALLEN FOR APPELLEES.

1. Sec. 157 of the constitution can not be given a retrospective operation so as to prevent a county from issuing bonds to pay for a public improvement which had been authorized by legislation before the constitution was adopted.
2. Sec. 157 of the constitution is not self-operative for the reason that it fails to provide the manner and formalities of an election to obtain the will of the people upon the question of increasing the indebtedness above the limit as indicated in that section.
3. Legislation being required to give effect to sec. 157 of the constitution, that section does not affect an indebtedness for public improvement, such as the purchase of turnpikes, authorized by legislation in force before the adoption of the constitution. (*Aydellott v. South Louisville*, 16 Ky. Law Rep., 166; *Holzhauser v. City of Newport*, 15 Ky. Law Rep., 188.)
4. The act of May 3, 1890, having been ratified by a two-thirds vote of the tax-payers and the indebtedness now sought to be repaid by the issue of bonds being thus authorized, sec. 157 can not affect the question.
5. Sec. 171 of the constitution which provides that "all taxes shall be levied and collected by general laws" does not repeal the act of May 3, 1890, so far as it provides for the purchasing of pikes and the issue of bonds for paying same, and, though it may amend or repeal the mode of levying and collecting taxes, still that fact does not affect the validity of the act, but taken in connection with the said amendatory acts the whole makes a complete law in no wise in conflict with the constitution.

JUDGE HAZELRIGG DELIVERED THE OPINION OF THE COURT.

The petition of the appellant, a citizen and taxpayer of the county of Fayette, seeks to enjoin the appellees, who constitute the fiscal court of the county, from issuing the bonds of the county to the amount of \$16,000 in payment for the Newton turnpike, situated in the county, and which, it is

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alleged, they were about to do in pursuance of act of the legislature of May 3, 1890, authorizing such issual.

It is alleged that the act is void and unconstitutional. That by the issual of the bonds the county "will become indebted for many years in an amount greater than the income and revenue provided for said years." That the defendants have not submitted to the voters of the county, "the question whether said bondsshall or shall not be issued, and two-thirds of the voters have not at any election, or in any other manner, giving their assent to the issuing of said bonds." And that the purchase of the turnpike was not effected or any improvement thereof undertaken prior to the passage of the constitution. Upon hearing, the lower court refused to grant the injunction. By consent of parties, the action was submitted to the court in the plaintiff's petition, and the same was dismissed, with judgment for the defendants' costs. The plaintiff has appealed.

The act sought to be invalidated is entitled "An act to authorize the county court of Fayette county to obtain, purchase or lease turnpike roads in said county, and maintain them free of toll from the traveling public."

It provides (1) that the county, through its county court and court of claims and levy may accept constructed turnpikes from the stockholders or owners thereof, and keep them in repair by working county convicts on them and by free labor, to be paid for by an annual tax as part of the county levy, and when thus obtained, the roads shall be free of toll from the traveling public. (2) That the county court, for the same purpose, may acquire such roads by purchase from the stockholders or owners thereof; and when thus obtained, they shall be kept up in the same way, and to pay for them, the county court may make a county levy tax.

And (3) that the county court may lease any such road on such terms and conditions as may be agreed on.

It was then provided that the county court, for the purpose of defraying the cost of such purchase or lease, might levy and collect a tax on the taxable property of the county of not exceeding twenty cents on the one hundred dollars of taxable property in any one year, to be collected in the same manner and under the same conditions as the tax in aid of the county levy; and might issue and sell a sufficient number of the bonds of the county in denominations of one thousand dollars, payable at such times and with such interest, not exceeding six per cent., as may be determined on by the court.

The act then provided for a transfer of the title of the company to the county, the appointment of a supervisor of such free turnpikes, and prescribed his duties.

The final section required the submission of the act to the approval of the voters of the county at the August election, 1890, and if a majority of the votes were cast in favor of free turnpikes, then the county court was authorized to carry the act into effect.

The chief suggestion offered by counsel for appellant, as preventing the threatened issual of the bonds, is that such action would be in violation of section 157 of the constitution.

So much of this section as is relied on, reads as follows: "No county, city, town, taxing district or other municipality shall be authorized or permitted to become indebted, in any manner or for any purpose, to an amount exceeding in any year the income and revenue provided for such year, without the assent of two-thirds of the voters thereof, voting at an election to be held for that purpose; and any indebtedness contracted in violation of this section shall be void."

Assuming for the present that this local act has not been repealed, either by the constitution or by the general laws on the subject of free turnpikes, as found in various sections of the Kentucky Statutes, the question remains: Is the prohibition clause, quoted above, to be read into the act and form a part of it? Or may turnpikes be purchased if the debt created by reason thereof exceeds, in any year, the income and revenue provided for such year without the assent of two-thirds of the voters. It is said by the appellees that the answer to these questions depends on whether or not we are to regard sec. 157 as self-operative, and that having held in *Aydelott v. South Louisville*, 16 Ky. Law Rep., 166, and in *Holzhauer v. City of Newport*, 94 Ky., 396, that it was not so operative, the section does not affect the right of the county to incur the proposed indebtedness.

We think this contention is based on a misconception of the principles decided in those cases. The special acts there under consideration were amendments to the respective charters of Newport and South Louisville.

In the *Holzhauer* case, by virtue of special authority to construct certain sewers and re-construct certain streets in Newport, contracts had been entered into, and an indebtedness thereby created before the adoption of the constitution; and in the other case, the indebtedness considered was created after the adoption of the constitution, but in pursuance of an amendment of the charter of South Louisville expressly authorizing a particular improvement, and which amendment was, in express terms, as were all charters and amendments thereto, continued in force by section 166 of the constitution. These city charters and amendments thereto were continued in force, not in so far only as they might not be inconsistent with other provisions of the constitution, as other laws of the Commonwealth were continued, but in

force save only as provided in section 167, which relates only to the election of certain officers.

But, even in cities where the increase of indebtedness was attempted only in pursuance of some general power to erect improvements, the prohibitive clauses of these sections have been held to apply.

Thus in *Beard, &c., v. City of Hopkinsville*, 95 Ky., 239, the city was about to create an indebtedness beyond the constitutional limit under an alleged general power, given in its old charter, but no contracts looking to that end had been made, or any debt created under that general power, prior to the adoption of the constitution. It was held that the provisions of sec. 158 prescribed a limitation on the proposed indebtedness. But, whatever effect may be given these sections as respects towns and cities, whose charters and amendments thereto were continued in force by the constitution, until general laws for the government should be enacted, there is no conceivable reason why the express prohibition found in the latter part of section 157 shall not be held effective against the creation of an indebtedness, on the part of counties and taxing districts, over their annual income and revenue without the assent of the legal voters as therein provided.

No legislative enactment could be more forceful or binding than the constitutional enactment itself.

What language could the legislature use more apt to express this inhibition than that used in the constitution, and why defer the application of these wise restraints on the power to create debts in excess of reasonable limits until the legislature might but repeat the inhibition?

It is further suggested by the appellant that section 171 of the constitution inhibits the levy and collection of taxes save by general laws, and, therefore, the provisions of the

act of May 3, 1890, authorizing the levy and collection of taxes, are inoperative.

Section 171 does provide that "all taxes shall be levied and collected by general laws," but if this provision has any application to the state of case at hand, the General Assembly has, since the adoption of the constitution, provided by general laws how all taxes may be levied and collected on behalf of the various counties, and these general laws may be considered as amending or repealing the special provisions in the local act.

The main question, however, in this case remains: Is the the local act authorizing the county court of Fayette county to purchase turnpikes and issue bonds in payment therefor, still in force notwithstanding the constitution and the various provisions on the subject of turnpikes now found in the Kentucky Statutes?

So far as the constitution is concerned, we have seen that section 157 does not affect the act except to the extent of preventing its operation, save on certain conditions. If by any purchase the county does not become indebted to an amount exceeding the revenue and income provided for the year in which such purchase is made and such indebtedness created, then the purchase may be made, but if, by any purchase, the county does become so indebted, it can not be made without the assent of two-thirds of the voters of the county, voting at an election to be held for that purpose; nor then, we may add here, in excess of the maximum percentages fixed in section 158. We have seen that section 171 does not affect the vitality of the act.

Just what general law is supposed to effect a repeal of this act of May 3, 1890, we are not told. There have been a series of acts, each partial in its scope, on the subject of turnpikes, and whether it is thought that act now sought to

be invalidated, has been repealed by some one of them, or in part by one and in part by another—piecemeal, as it were—or by the combined effect of all, we do not know. We do know that while the constitution prohibited the General Assembly from passing local and special acts, it authorized the passage of such acts to repeal local acts, and continued in force all laws of the Commonwealth not inconsistent with its provisions until altered or repealed by the General Assembly.

As we have said, certain general laws have been passed at different times and at different sessions of the legislature on the subject involved, and the question is, Do these laws, or any of them, repeal the local act?

While the framers of the constitution evinced their hostility, so to speak, toward local and special legislation, and authorized the passage only of general laws, we do not understand that the general rules of construction, by which one act may be construed to repeal another, has in any wise been changed. Among these well-settled rules are these: That a general statute will not, by mere implication, repeal a former one which is special or local; that, moreover, there must be such a repugnancy between the provisions of the acts, that they can not stand together, or be consistently reconciled. This rule applies when both statutes are of a general nature, and the presumption against repeal is strengthened when the one act is local or special and the other general. The principles determined in *Broadbuss' devisees v. Broadbuss' heirs*, 10 Bush. 299, have no application here. The book entitled "The Kentucky Statutes," is not a revision of the laws of the Commonwealth; it is merely a collection of them and each act speaks for itself with respect to its effect on prior acts. But an examination of these re-

cent acts will demonstrate that they have little in common with this local act.

There is identity neither as to the subject matter or purpose of the acts, nor of the powers given thereunder.

We have already enumerated the powers given the county court or court of claims and levy under the local act, and have seen that the particular power involved in this case is the right to acquire any turnpike road by purchase from the stockholders or owners thereof, and keep the same in repair, "free of toll from the public."

Of these subsequent acts we have:

First, that of August 24, 1892 (secs. 4742-4748 Ky. Stat.), providing for the appropriation of surplus funds on hand in any county, to the building and maintaining pikes or gravel roads, if a majority of the legal voters of the county favor such appropriation.

Second, that of May 15, 1893 (sec. 4736 Ky. Stat.), designed to prevent unjust and double taxation for turnpike roads, when the property taxed is situated in more than one district.

Third, that of July 6, 1893 (secs. 4734 and 4735, Ky. Stat.), authorizing the county court to subscribe stock for the county in companies organized to construct toll roads not to exceed twelve dollars and fifty cents per mile, with power to levy a tax to pay the subscription, or, when there was a surplus on hand, to independently construct such roads.

Fourth, that of July 10, 1893 (sec. 4723 Ky. Stat.), providing that if any incorporated turnpike road company shall fail or refuse to keep up its road or shall forfeit its charter, the county court may take charge of the road and maintain it at the expense of the county, or may erect toll-gates thereon to aid in its maintenance.

Fifth, that of March 3, 1894 (sec. 4737 to 4741), authorizing fiscal courts to subscribe stock in turnpike road companies and hold the same for the public, provided a petition therefor be presented to such court, and a majority of the voters vote in favor of levying a tax to pay for such stock.

This act restricts subscription to said incorporated companies, which are the exclusive owners of and operating the road for their exclusive benefit. Other provisions look to the appointment of commissioners, who shall ascertain the number of miles of road that can be built with the funds on hand, as provided in preceding acts.

Sixth, that of March 10, 1894 (secs 1886-1893 Ky. Stat.), which provides for the appropriation of surplus funds, in any county, to construct turnpike roads, and is similar in character to the act of August 24, 1892, but no vote seems to be required.

If there are any other acts on this subject they have escaped our attention, and it is manifest that they do not severally or when taken altogether constitute a systematic or comprehensive law on the subject of free turnpikes. At all events they fall far short of embracing the powers granted in the local act under consideration. This act and the general statutes may all stand together, and are in no wise inconsistent. We think the local act, therefore, has not been repealed, and under it, save so far as modified by secs. 157 and 171, of the constitution, the fiscal court of Fayette county may issue bonds in payment for pikes as provided in the act.

It is, in effect, alleged in the petition in this case that the indebtedness created by this purchase and issual of the bonds will be in excess, in a given year, of the income and revenue provided for that year. If this be true, the county can not incur the indebtedness without submitting the ques-

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tion to a vote of the people as required in section 157 of the constitution.

Wherefore, the judgment is *reversed* in order that this issue of fact may be heard, if the appellee so desires, and the case tried out in conformity with the principles of this opinion.

CASE 106—INDICTMENT—JUNE 22.

Reddy v. Commonwealth.

APPEAL FROM PENDLETON CIRCUIT COURT.

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1. **FORMER CONVICTION.**—Where the same acts constitute two or more misdemeanors, any court having jurisdiction of any one of the misdemeanors may elect to try, and if it does so this trial will bar a prosecution for any other misdemeanor upon the same facts. But a prosecution for a misdemeanor in an inferior court having jurisdiction to try misdemeanors only will not bar a prosecution for a felony upon the same facts, as no one can be said to be in jeopardy on a charge for felony in a court that has no jurisdiction of felonies.

In this case a conviction in a police court for a breach of the peace by shooting and firing off pistols in the streets of a city is held to be a bar to an indictment for willfully and maliciously injuring the county courthouse by the same acts.

2. **Same.**—A trial by collusion of the accused and the officers is of no validity and affords the accused no protection.

L. P. FRYER FOR APPELLANT.

The former conviction is a bar. The State can carve but one offense out of the same act or transaction and when it elects to prosecute for the lower grade of offense the law will not permit another prosecution for the higher grade. (*Wilson v. The State*, 24 Com., 70; *Triplett v. Commonwealth*, 84 Ky., 195; *Commonwealth v. Duncan*, 91 Ky., 592; *Commonwealth v. Bright*, 78 Ky., 238; *Commonwealth v. Hawkins*, 11 Bush, 603; *Commonwealth v. Miller*, 5 Dana, 320; *Fisher v. Commonwealth*, 1 Bush, 211; 11 Am.

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& Eng. Ency. of Law, pp. 934, 935, 936, 939, 942; Present Const. of Ky., sec. 13; 1 Bishop on Crim. Law, secs. 1057, 1060, 1061; Cooley's Const. Limit, p. 398.)

JNO. H. BARKER OF COUNSEL ON SAME SIDE.

WM. J. HENDRICK, ATTORNEY GENERAL.

The judgment of the police court punishing appellant for a breach of the peace is not a bar to this indictment. (Commonwealth v. Miller, 5 Dana, 320; March v. Commonwealth, 12 B. M., 25; Chandler v. Commonwealth, 1 Bush, 42; Cornelison v. Commonwealth, 84 Ky., 583.)

JUDGE GRACE DELIVERED THE OPINION OF THE COURT.

This is an appeal by John Reddy, Thomas Reddy and Chas. Wedding from the judgments rendered against them by the Pendleton Circuit Court, each separately, but aggregating \$1,000, on an indictment in said court, charging them with wilfully and maliciously injuring the court house of said county by shooting through the windows, breaking the glass in same, and by shooting against the walls and ceilings of same, injuring said building.

This indictment was laid under section 1258 of the Kentucky Statutes.

Upon the trial the defendants, in addition to their separate pleas of not guilty, offered to file, and did file, a plea of former conviction, in which they said that they had theretofore been arrested, tried and fined by the police court in Falmouth (county seat of same county) for a breach of the peace, by shooting and firing off pistols and other fire arms in the streets of that city. That they had been fined seventy-five dollars each and costs, and had replevied and paid said fines, and that the acts charged in this indictment, as done by them, were the same acts and the same transaction, occurring at the same time and place as those for which

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they had theretofore been convicted. They also pleaded the jurisdiction of the police court that tried and fined them.

They filed with this plea copies of the proceedings in the police court and the judgments rendered.

To this plea a demurrer was filed by the Commonwealth and sustained. And of this error the defendants now complain.

On first impression it would appear that the charge of a breach of the peace by shooting fire arms in the town of Falmouth (in police court), and the charge in the indictment of shooting into and against the court house of Pendleton county, are not sufficiently identified in and by the papers of the two proceedings as to be held one and the same thing. On reflection, however, this is not deemed the true test. The Commonwealth by giving different names to the same thing done, or by prosecuting under different statutes, can not multiply offenses out of one and the same thing done by the accused.

The affirmation in the answer or plea of former conviction is that it was one and the same transaction done at the same time and place and no other. This plea presented an issue of fact, and, if denied, must have been established as a question of fact before the jury. And, so, on a demurrer being sustained, the allegations of the plea must be taken as true. And, if true, then the question is presented whether this double prosecution is not inhibited by the constitution, providing that no man shall be twice put in jeopardy of life or limb for the same offense.

The effect of this provision was reviewed at some length by this court in the case of *Williams v. Commonwealth*, 78 Ky., 93, opinion by Judge Hines, and a liberal construction given to it, saying, in substance, that no nan should be twice tried, or twice punished for the same offense.

In that case the Kentucky authorities were reviewed, and it was shown that both by legislative and judicial construction that effect had been given to criminal proceedings, as that one prosecuted for a breach of the peace could not afterward be prosecuted for an assault and battery committed in the same transaction.

Mr. Bishop is shown to favor the same rule, and while he says that out of a given state of facts, criminal in their nature, and violative of different statutes, the Commonwealth may carve out and charge the highest offense, yet having once elected and prosecuted for a minor offense she can not, on the same facts, be afterwards allowed to prosecute for the higher offense.

This court has held it as against the spirit of the rule to cut up or divide one transaction into separate offenses, as that one tried and acquitted for burglary with intent to steal can not afterwards, on another indictment, be convicted of grand larceny, growing out of or committed in the same felonious breaking the house.

And, again, that one acquitted on an indictment for horse stealing shall not be convicted on a separate indictment for stealing a wagon and harness, the evidence showing it to have been but one transaction, committed at the same time and place and by taking from the same party.

Neither can separate felonious takings be so combined in one indictment as to increase the value of the property taken in the aggregate to grand larceny when, separately, the offense was only petit larceny.

The rule seems to be that where the acts done have been selected by the Commonwealth and given in evidence to support any prosecution she may choose to make, even for a smaller offense than she might have charged, yet, on these

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same facts, essentially, she can not thereafter successfully maintain another prosecution for a higher offense.

This doctrine has even been once announced in Kentucky, that a prosecution before a magistrate for breach of the peace, by assault and battery, will bar a subsequent prosecution for a felony growing out of the same act done. This was in the case of *Commonwealth v. Bright*, 78 Ky., 238.

This authority, however, on review, we are inclined to question. While we take it to be true that while of the acts done the whole may properly be laid as misdemeanors only, there the courts having authority to try for misdemeanors may make the election and one prosecution will bar the others.

Yet, it was never intended by this principle or rule to say that a prosecution for a misdemeanor only, in an inferior court having jurisdiction to try misdemeanors only, though on the same facts, would be a bar to a prosecution for a felony. And this distinction rests clearly on the ground that no one can be said to be in jeopardy on a charge for felony, in a court that has no jurisdiction. This is essential, as between felonies and misdemeanors.

Where the highest offense, however, is a misdemeanor, then any court having jurisdiction of any one of the misdemeanors that may have been committed by the accused may elect to try, and if it does so, this trial should bar prosecution for any other misdemeanor.

But where the offense committed was, in fact, a felony, then no court of inferior jurisdiction should be permitted to embarrass the Commonwealth or to shield or protect the prisoner by a prosecution for a misdemeanor.

Thus interpreted this rule affords all necessary protection to both the State and the prisoner.

We put it prominently forward now because we think

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it has often been overlooked by text-writers as well as courts. Of course, we are assuming that the first prosecution in this case was in good faith, and not by any fraudulent collusion between the accused and the police judge. There is nothing in this record intimating any such a state of case.

The uniform ruling in this court has been that a trial by collusion of the accused and the officers is of no validity and no protection.

Notwithstanding the court sustained a demurrer to the plea of former conviction in this case, yet the evidence introduced showed clearly that it was the same act complained of, both in the police court and by indictment. Certain it is, that the same facts were given in evidence in both cases, and they have been fined in both. This is not in accordance with the humane spirit of our Criminal Code.

The judgments are reversed for further proceedings not inconsistent with this opinion.

CASE 107—PETITION EQUITY—JUNE 22.

Morgan, &c v. Halsey, Trustee.

APPEAL FROM LOUISVILLE LAW AND EQUITY COURT.

1. THE INTENTION OF THE DONOR OF A POWER IS THE GREAT PRINCIPLE THAT GOVERNS IN THE CONSTRUCTION OF POWERS; and in furtherance of the object in view the courts will vary the form of executing the power, and, as the case may require, either enlarge a limited to a general power or cut down a general power to a particular purpose.

A mother devised her estate to a trustee for the sole and separate use of her daughter for and during the period of her natural life, with the right on her part to use and control proceeds as she

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might think proper, and at her death the whole to belong to her children, should she have any. But in case she should leave no issue she was invested with the power of disposing of the estate in any manner she might deem proper by writing in the nature of a last will and testament. The testator then provided that if the daughter should die without issue, and "without having made any disposition of the property as above provided," it should go to the brothers and sister of testatrix, this clause being added: "In making this devise in the event of my daughter dying without issue and failing to make any disposition of the estate, I have desired in the first place to make her independent and comfortable, and in the next place to leave her a memorial of my wishes as to its ultimate disposition, unless circumstances should alter, of which she is to be sole judge, not intending hereby to control her perfect freedom to do with it as she pleases at her death without issue." Held—That the power of appointment conferred upon the daughter was not absolute and unconditional, but was intended to be exercised only in the event "circumstances should alter," and as it is not stated in the will of the daughter, and does not otherwise appear, that there was any alteration or change of the condition or circumstances surrounding the daughter or the other devisees under the mother's will, the attempted exercise of the power of appointment by the daughter by her last will is void, and the devise by the mother to her brothers and sister takes effect.

2. **FINAL ORDER—CONCLUSIVENESS OF JUDGMENT.**—In this action brought by the trustee under the wills of both mother and daughter asking a construction of both wills, a judgment directing him to turn over the mother's estate to himself as trustee under the daughter's will, and do certain things in execution of the provisions of the daughter's will, was not a final judgment, and did not preclude one of the devisees under the mother's will who was before the court when the judgment was rendered from thereafter questioning the validity of the attempted exercise by the daughter of the power of appointment under the mother's will. But even if the judgment was final and binding on the devisee before the court, the devisees who were not then before the court had the right to thereafter file pleadings in the action and question the validity of the daughter's will in so far as it attempted to dispose of the mother's estate, and a judgment holding it invalid will inure to the benefit of all devisees under the mother's will.

**WM. LINDSAY, BYRON BACON, BASIL W. DUKE, J. D. HUNT
AND ERNEST MACPHERSON FOR APPELLANTS.**

1. This court has jurisdiction notwithstanding the property or inter-

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- est involved may be situated without the State. (Mitchell v. Bunch, 2 Paige, 606; Hanley & King v. James *et al*, 7 Paige Chy., 213; Carroll v. Lee, 3 Gill & J., 404; Great Falls Mfg. Co. v. Wooster, 23 N. H., 462; Massie v. Watts, 6 Cranch, 148; Watkins v. Hollman, 16 Peters, 25 and 27; note to Penn v. Lord Baltimore, 3 Leading Cases in Equity, p. 783; Perry on Trusts, secs. 70 and 71; Mason v. Chambers, 4 J. J. Mar., 410 and 411; Newton v. Bronson, 13 N. Y., 587.)
2. The legality of the charity is to be determined by the law of the place where it is to be applied. (1 Jarman on Wills, p. 458; New v. Bonaker Law Rep., 4 Eq., 655; Att'y Gen'l v. Mill, 3 Russell's Eq. Rep., 328; Perry on Trusts, vol. 2, sec. 741.)
 3. The so-called doctrine of *cy pres*, had it not been abrogated in Kentucky, could have no application to this case. (1 Jarman on Wills, pp. 458 and 459; 2 Pomeroy's Eq. Jur., sec. 1027.)
 4. In this State the *cy pres* doctrine is repudiated, and the statute of 43 Elizabeth is repealed. (1 M. & B., p. 308; Gass & Bonta v. Wilhite, 2 Dana, 170; Curling v. Curling, 8 Dana, 38; Chambers v. Baptist Educational Society, 1 B. M., 215; Attorney General v. Wallace, 7 B. M., 611; 2 Perry on Trusts, p. 388, note; Cromie's heirs v. Louisville Orphans' Home Society, 3 Bush, 373.)
 5. The tomb or chapel to be erected at Spa, in Belgium, is in no sense a charity. (Bates v. Bates, 134 Mass., 307; Melick v. Asylum, Jacob, 180; Kelly v. Nichols, 17 R. I., 317.)
 6. The provision relating to the Hunt-Grosch Asylum is too indefinite and uncertain to be enforced. (Holland v. Alcock, 108 N. Y., 323; Levy v. Levy, 33 N. Y.; Maught v. Getzendammer, 65 Md., 527; Zeiseveiss v. James, 63 Pa. St., 468; Grimes v. Harmon, 35 Ind.; Holland v. Peck, 2 Ired. Chy., 255; Green v. Allen, 5 Humph., 170; Bridges v. Pleasants, 4 Ired. Chy., 26; White v. Fiske, 22 Conn., 31; Colt v. Comstock, 51 Conn., 352; Bolles v. Smith, 39 Conn., 217; Att'y Gen'l. v. Soule, 28 Mich., 153; Pritchard v. Thompson, 95 N. Y., 76; Thomas v. Howell, L. R., 18 Eq., 198; Carpenter v. Miller, 3 W. Va., 174.)
- The Kentucky cases are not inconsistent with this view. (Peynado's devisees v. Peynado's exor., 82 Ky., 5; Leeds v. Shaw's adm'r, 82 Ky., 79; Kinney v. Kinney, 86 Ky., 610; Penick v. Thom's trustee, 90 Ky., 665; Ford v. Ford's exor., 91 Ky., 572.)
7. Even a charitable trust, where the incorporation of a permanent institution is intended, violates the statute against perpetuities. (Cruikshank v. Home for the Friendless, 18 Abbott's New Cases, p. 282; Levy v. Levy, 33 N. Y.)
 8. A power of disposition can not be executed for the benefit of the life tenant. (Perry on Trusts, sec. 511.)

The intention of the donor controls the exercise of the power.

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(Wilson v. Trump, 14 Am., Dec., 465; White v. Tudor's Leading Cases in Equity, Part 1, vol. 1, sec. 384.)

Considering these two rules in connection, the attempted evasion is manifest so far as the proposed chapel and tomb are concerned.

9. The Baroness took only an estate for life, and was invested with a power of disposition or appointment only in the event that she died without issue, and then to be exercised only in regard to certain beneficiaries in whose behalf Mrs. Strother's will created a trust. The only way of reconciling the various provisions of the will is to limit the discretion of the Baroness to the method of distribution among those beneficiaries. (Kent's Comm., vol. 4, star page 237; Washburn on Real Property, Book 2, star page 320; Colton v. Colton, 127 U. S., 312; Elliott v. Elliott, 117 Ind., 380; Noe v. Kern, 93 Mo., 367; Warner v. Bates, 98 Mass., 274; Knox v. Knox, 59 Wis., 172; Bohon v. Barret, 79 Ky., 378; Major v. Herndon, 78 Ky.; Collins v. Carlisle's heirs, 7 B. M., 13; Perry on Trusts, sec. 114; Balls v. Damfman, 69 Md., 390.)

CHARLES J. BRONSTON ON SAME SIDE.

1. It was the intention of Mrs. Strother that her property should go to her own kindred, and the only discretion which she conferred upon her daughter was to say in what proportion the beneficiaries she had selected should take, no power to select other beneficiaries being conferred. And that discretion was to be exercised only in the event "circumstances should alter." (Howell v. Tyler, 91 N. C., 207; Quinn v. Hardenbrook, 54 N. Y., 86.)
2. Even if the Baroness was to have the power to select other beneficiaries than those named by her mother, she was to have that power only in the event the "circumstances" or financial condition of those beneficiaries should alter. The power was therefore a conditional one and it devolved upon the donee of the power, or upon the appellee, to show that the conditions permitting its exercise had arisen. (18 Am. & Eng. Enc. of Law, 937; 4 Kent's Comm., star page 330; *Idem*, pp. 365, 366.)
3. The devise by Mrs. Strother to her daughter contains all the elements necessary to constitute a precatory trust. (Knox v. Knox, 59 Wis., 172; Major v. Herndon, 78 Ky., 123; Warner v. Bates, 98 Mass., 274.)
4. The provision in relation to the chapel or tomb is certainly illegal. (Johnson v. Holifield, 79 Ala., 423; s. c. 58. Am. Rep., 596; Kelley v. Nichols, 17 R. I., 317.)

The donee of the power had no right to dispose of the estate for her own benefit. (Balls v. Damfman, 69 Md., 390.)

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5. The *cy pres* doctrine can have no application under Kentucky laws to any possible charitable bequest. (Cromie's heirs v. Louisville Orphans' Home Society, 3 Bush, 373; Beekham v. Bousor, 23 N. Y., 298; note by Judge Freeman, 80 Am. Dec., 288.)
6. The power given by Mrs. Strother to her daughter reposed a personal trust and confidence in the daughter as the donee, and she could delegate this to no other person. (1 Snyder on Powers, p. 213; Pearson v. Jamison, 1 McLean, 197.)
7. The will of the Baroness is utterly unreasonable, the money being totally inadequate for the purposes contemplated, and the chancellor should not render a decision sustaining an inevitable waste of money simply because it is denominated charity.

SIMRALL & BODLEY FOR APPELLEE.

1. The asylum clause, whether it be tested by the common law, or by the statute of 43 Elizabeth, or by the law of Missouri, or by the law of Kentucky, is clearly valid. (Perry on Trusts, secs. 687, 710; 2 Pomeroy's Equity, sec. 1018; Story's Equity, sec. 1169; 2 Minor's Inst., p. 231; Russell v. Allen, 107 U. S., 163; Inglis v. Sailor's Snug Harbor, 3 Pet., 99; Ould v. Washington Hospital, 95 U. S., 303; Whicker v. Hume, 7 H. L. Cas., 124, 141, 155; Gass v. Wilhite, 2 Dana, 170; Moore v. Moore, 4 Dana, 354; Curd v. Wallace, 7 Dana, 190; Curling's adm'r v. Curling's heirs, 8 Dana, 38; Chambers v. Baptist Educational Society, 1 B. M., 214; Attorney General v. Wallace, 7 B. M., 612; Cromie's heirs v. Louisville Orphans' Home, 3 Bush, 372; Peynado v. Peynado, 82 Ky., 13; Leeds v. Shaw, 82 Ky., 79; Kinney v. Kinney, 86 Ky., 611; Penick v. Thom., 90 Ky., 665; Ford v. Ford, 91 Ky., 592; P. E. Society v. Churchman, 80 Va., 718; Chambers v. City of St. Louis, 20 Mo., 543; Academy of Visitation v. Clemens, 50 Mo., 167; Goode v. McPherson, 51 Mo., 126; Schmidt v. Hess, 60 Mo., 591; Schumaker's Est. v. Reel, 61 Mo., 692; First Baptist Church v. Robinson, 71 Mo., 326; Howe v. Wilson, 91 Mo., 49; Powell v. Hatch, 100 Mo., 592.)

The doctrine of charities as generally recognized does not exist in New York, and has not existed there, and therefore the New York cases have no application here. (Bascom v. Albertson, 34 N. Y., 584.)

Even if it were true that the Maryland and New Jersey poor are not capable under our law of being the beneficiaries of the Baroness' bounty, still the Kentucky poor are. If a trust is created for two persons, or sets of persons, the fact that one of them can not receive the benefit of the trust will not deprive the others of it. (Perry on Trusts, sec. 709.)

2. The chapel bequest is both charitable and valid, a chapel being a

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place of worship. (Bispham's Eq., sec. 119; 2 Williams on Executors, 1072, citing 7 B. M., 611; 2 Dana, 170.)

But even as a tomb or monument the chapel bequest would be valid. (Perry on Trusts, sec. 706; Howe v. Wilson, 91 Mo., 49; Fite v. Beasley, 12 La., 339; Ford v. Ford's exors., 91 Ky., 572.)

3. The Baroness had power under Mrs. Strother's will to dispose of the latter's estate in favor of a charity. The words of recommendation or request did not create a trust, the testator having in effect declared that such was not her intention. (Story's Equity, 1069; notes to Harding v. Glyn, 3 White & Tudor's Leading Cases in Equity; Meredith v. Henlag, 1 Sim., 536; Sale v. Thornberry, 86 Ky., 266; Enders v. Tasco, 89 Ky., 17; Perry on Trusts, sec. 115; Pomeroy's Equity, sec. 1016; 1 Minor's Inst., 65.)
4. The judgment of May 17, 1888, was final and binding upon Mrs. Morgan, and the case having been finally disposed of by that judgment, there was thereafter no case in which strangers could intervene. Therefore the pleadings subsequently filed by Mrs. Dudley and Thomas H. Hunt's heirs were mere nullities, and those parties have no standing in court. (Hawes on Parties, sec. 109; Pomeroy's Remedies, sec. 423; Brown v. Vancleve, 86 Ky., 385; Larue v. Larue, 2 Litt., 261; Evans v. Stone, 80 Ky., 110.)

B. F. BUCKNER ON SAME SIDE.

1. The judgments of May, 1888, were final, and it was not in the power of the court rendering them to set them aside and rehear the matter litigated, except in a proceeding for their vacation, and upon grounds specified in the statute. (McManama v. Garnet, 3 Met., 517; Magman v. Pennybacker, 3 Met., 502; Scott v. Scott's exor., 9 Bush, 176.)
2. The judgment being final, all the persons interested in the adjudication are bound by its provisions, and it is too late to claim an interest in the controversy and intervene after the decision. (Hawes on Parties, sec., 109; Pomeroy's Remedies, sec. 423; Brown v. Vancleve, 86 Ky., 385; Larue v. Larue, 2 Litt., 261.)
3. The chapel clause is valid. (Perry on Trusts, sec. 706; Lloyd v. Lloyd, 10 Eng. L. & Eq., 139; Dexter v. Gardiner, 7 Allen, 247; Swasey v. Amer. Bible Soc., 57 Me., 527; Gravener v. Hallam, Amb., 643; Bispham's Eq., sec. 133; Chapman v. Brown, 6 Ves., Jr., 404; Willis v. Brown, 2 Jurist, 987; Mitford v. Reynolds, 1 Phillips Chy., 196; Smith v. Hess, 60 Mo.; Ford v. Ford, 91 Ky., 572; 1 Jarman on Wills, side page 193.)

The rule against perpetuities has no application in case of a charitable use. (Russell v. Allen, 107 U. S., 163; Perry on Trusts, sec. 384; Gass v. Wilhite, 2 Dana, 183; Philadelphia v. Girard, 45 Pa. St., 26.)

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4. Even if the chapel clause is void, the sum dedicated for that purpose falls into the residue devised for the asylum. (*Linley v. Gurr*, 6 Madd. Chy., 99; *In re Williams* L. R., 5 Chy. Div., 737; *In re Birkett*, L. R., 9 Ch. Div., 578; *Fisk v. Attorney General* L. R., 4 Eq., 524.)
5. The asylum clause is valid. (Gen. Stats., chap. 113, sec. 22; *Moore v. Moore's heirs*, 4 Dana, 354; *Moggridge v. Thackwell*, 7 Ves., Jr., 75; *Curling v. Curling*, 8 Dana, 38; *Garrs v. Wilhite*, 2 Dana, 177; *Perry on Trusts*, sec. 687; 2 *Pomeroy's Eq.*, sec. 1016; 2 *Story's Eq.*, 1169; *Chambers v. City of St. Louis*, 20 Mo., 543.)
6. There is no precatory trust declared in the will of Mrs. Strother. (*Knight v. Knight*, 3 Beav., 172-3; *Vanduyne v. Vanduyne*, 14 N. J., Eq., 397; *Howard v. Carusi*, 109 U. S., 725; *Williams v. Williams*, 1 Simmons, N. S., 358; *Foose v. Whitmore*, 82 N. Y., 405; *Pennock's Estate*, 20 Pa. St., 268; *McIntyre v. McIntyre*, 123 Pa. St., 329; *Knox v. Knox*, 59 Wis., 172; *Bacon v. Ransom*, 139 Mass., 117; *Rose v. Porter*, 141 Mass., 309; *Willits v. Willits*, 35 Hun., (N. Y.), 401; *In re Adams* 27 Chan. Div., 394; *Meredith v. Heneage*, 1 Sim., 542; *Hay v. Master*, 6 Sim., 568; *Huskisson v. Bridge*, 4 De G. & S., 245.)
Bohon v. Barret, distinguished.

JUDGE LEWIS DELIVERED THE OPINION OF THE COURT.

March 4, 1887, Edmund T. Halsey, trustee under the will of Theodocia Strother, also executor, trustee and administrator under the will of Sally Williams Strother, Baroness of Fahrenberg, brought this action in Louisville Law and Equity Court, asking that court to construe the two wills, determining rights of all parties interested; to order settlements of his accounts, as such trustee, executor and administrator, and to immediately direct him whether he should make the contract for erection of a chapel at Spa, Kingdom of Belgium, that was provided for in the will last mentioned.

It is stated in the petition, and amended petition, and also appears that the will of Theodocia Strother was in September, 1893, proved in the probate court of St. Louis, Missouri, where she was at the time of her death, domiciled; and in January, 1886, the will of Sally Williams Strother, Bar-

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ness of Fahnenberg, was duly proved in the same probate court, she being, at time of her death, likewise domiciled in St. Louis. It further appears, the last mentioned will was in January, 1886, admitted to probate by the Jefferson County Court, of this State, and plaintiff Halsey was then appointed administrator.

Henrietta Morgan, Richard C. Morgan, Sally Day and Sally Williams Strother were, at commencement of the action, made parties defendants. And May 17, 1888, a judgment was rendered, in substance, as follows: 1. That plaintiff, as trustee under the will of Theodocia Strother, and as administrator of the estate of Sally Williams Strother, Baroness of Fahnenberg, turn over to himself, as trustee under the will of last named testatrix, all property, real and personal, wherever situated, belonging to estate of either testatrix. 2. That he pay all charges payable out of either estate by or to himself as trustee under the will of Sally Williams Strother, or as executor or administrator; and especially pay the sum of \$5,000, being annuity then due under said will, to Henrietta Morgan. 3. That he, in execution of provisions of that will, cause to be expended a sum not exceeding \$60,000 in purchase of a lot in or near town of Spa, Belgium, and in erection of chapel and vault mentioned therein. 4. That he expend residue of both estates in, or to come to his hands, in building, endowing and establishing the Hunt-Grosch Asylum, indicated in said will. 5. That the action be retained for the purpose of settling plaintiff's accounts, and directing him in performance of his duties under this judgment and under the wills.

April 25, 1889, Henrietta C. Morgan filed her answer, made a counter-claim; and Mamie T. Hunt and others, heirs at law of Thomas H. Hunt, and of Francis K. Hunt, at same time filed their joint petition to be made parties defendants

to the action, which they asked be taken as their answer and counter-claim. In each answer and counter-claim it is, in substance, alleged that the fifth clause of the will of Sally Williams Strother, so far as it purports to make plaintiff Halsey trustee, and vest in him as such any part of the estate of Theodocia Strother, for the purpose of purchasing the lot and erecting thereon the chapel and vault referred to, or for founding, endowing and establishing the asylum referred to, is void, and defendants are entitled to that estate in virtue of the will of Theodocia Strother.

To each answer and counter-claim plaintiff filed a demurrer for want of jurisdiction, and because facts were not stated sufficient to constitute either a defense or cause of counter-claim. The demurrer was overruled as to first, but sustained upon second ground. And now, we have, on this appeal, questions of proper construction and meaning of the two wills, each of which we deem it necessary to set out in full.

The will of Theodocia Strother is as follows:

"I, Theodocia Strother, now in the city of Paris, France, do hereby make and ordain this, my last will and testament, hereby revoking all others by me made.

"Item 1. I have a box of plate in the United States of America, and in it is a silver pitcher, presented to my father, in his lifetime, by the Insurance Company of Lexington, Kentucky. I do hereby give and bequeath it to my brother Francis K. Hunt, as a testimony of my affection, and all the residue of said plate, I give and bequeath to my daughter Sally, the Baroness of Fahrenberg, to her and her heirs forever.

"Item 2. All the rest and residue of my property, of every character and description, real and personal and mixed, wherever situate, I do hereby devise, give and bequeath to

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my brother, Francis K. Hunt, to be by him held in trust for the following purposes, viz: For the sole and separate use of my daughter Sally, the Baroness of Fahrenberg, for and during the period of her natural life, with the right on her part to use and control the proceeds or profits as she may think proper, and at her death the whole to belong to her children, should she have any. But in case she should leave no issue, she is hereby invested with the power of disposing of the estate in any manner she may deem proper, by writing in the nature of a last will and testament. Should she die without issue and without having made any disposition of the property, as above provided, it is then my will, and I do hereby direct my trustee to divide it into three equal parts, one of which I do hereby devise, give and bequeath to my sister, Henrietta Morgan, to her and her heirs forever; but in case she should not be then living, the devise and bequest to go to her heirs. Another third part I devise, give and bequeath to my brother, Thomas H. Hunt, and in case he should not be living at the period of the designated contingency, then to his heirs. Another third part I devise, give and bequeath to my brother, Francis K. Hunt, and in contingency herein mentioned shall happen then to his heirs. In making this devise, in the event of my daughter dying without issue and failing to make any disposition of the estate, I have desired in the first place to make her independent and comfortable, and in the next place to leave her a memorial of my wishes, as to its ultimate distribution, unless circumstances should alter, of which she is to be the sole judge, not intending hereby to control her perfect freedom to do with it as she pleases at her death without issue.

"Item 3. I do hereby nominate, constitute and appoint my brother, Francis K. Hunt, executor of this, my last will

and testament, and desire that he may qualify without being required to give security."

The other will is as follows:

"I, Sally Williams Strother, Baroness of Fahnenberg, American citizen, nevertheless temporarily residing in the city of Paris, France, hereby make and ordain this my last will and testament.

"Item First. I give and bequeath to my aunt, Henrietta Morgan, five thousand dollars per annum during the time of her natural life.

"Item Second. I give and bequeath all my jewelry, diamonds and gold ornaments, including those which belong to my mother, to Sally Day, daughter of Thomas D. Day, because of the latter's great affection for my mother and brother.

"Item Third. I give and bequeath all my silverware, pictures, engravings and books to Richard C. Morgan, of Lexington, Kentucky.

"Item Fourth. I give and bequeath all my wearing apparel, silks, laces, shawls, linen, etc., to Sally Williams Strother, of Virginia.

"Item Fifth. All the rest and residue of my property of every character and description, real and personal and mixed, wherever situated, I do hereby devise, give and bequeath to Mr. Edmund T. Halsey, of Louisville, in the State of Kentucky; in trust, nevertheless, for the following purposes, viz: 1st. That he shall expend and supply the sum of \$60,000 in the purchase of a lot and building thereon, that is to cause to have built and erected on said plot of ground, in the town of Spa, Belgium, a chapel and vault, paneled and paved with marble, to contain the tombs of my mother, of my brother and my own, and to cause his, her and my remains to be interred therein. Also to invest in first-class

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securities, that is, bonds of the United States of America, the sum of \$7,000, the interest of which shall be devoted to keeping the said chapel in good order, under the supervision of the pastor of the English church at said town of Spa, and his successors in office.

"2d. That after paying the above mentioned legacies and building and endowing the said chapel in the manner aforesaid, he, the said Edmund T. Halsey, shall devote, spend, employ and apply all the rest and residue and remainder of my estate, including all I shall have inherited from my mother and can dispose of by will, according to a certain clause in her testament, in the building, erecting and endowing, founding and establishing an asylum for the good, welfare and benefit of poor, young, white, protestant children of poor, protestant, white men and of poor, old, protestant, white women. Said asylum to be established in the city of Lexington, State of Kentucky, and to be called the "Hunt-Grosch Asylum," in memory of my grandfather and grandmother, whom my mother loved so dearly. The children and old men and old women, for whose special benefit the above asylum is to be founded, shall belong exclusively to the States of Kentucky, New Jersey and Maryland."

By the sixth clause, Edmund T. Halsey was appointed executor.

A preliminary question is raised by counsel of appellee, we will first decide, whether Henrietta Morgan, being then a party before the court, is concluded by the judgment rendered May, 17, 1888. It seems to us that can not be treated as a final judgment, and the chancellor, in his opinion, says it was intended to be merely an interlocutory judgment. But whether one or the other, it was premature, and certainly does not conclude the heirs at law of Thomas H. Hunt and

Francis K. Hunt, who were not before the court. For they had the right to contest validity of the fifth clause of the will of Sally Williams Strother, as they are now doing. And if it shall be determined that clause is not valid and effectual, the bequests made by it would be nullities and the powers and duties of Halsey as trustee would end; the result being the estate thereby attempted to be disposed of would go to devisees of the will of Theodocia Strother, including heirs at law of Henrietta Morgan.

In order to render said fifth clause valid, it must appear that Theodocia Strother intended the power of appointment to be not only general, giving her daughter, Sally Williams Strother, liberty to appoint to whom or what object she pleased, irrespective of the devises to her sister and two brothers, but also absolute and unconditional.

As said in Kent's Commentaries, vol. 4, 345: "The intention of the donor of a power is the great principle that governs in the construction of powers; and in furtherance of the object in view the courts will vary the form of executing the power, and, as the case may require, either enlarge a limited or general power or cut down a general power to a particular purpose." And in determining nature and extent of a power the following rule is laid down (see p. 337): "An estate created by execution of a power takes effect in the same manner as if it had been created by the deed which raised the power. The party who takes under the execution of the power takes under the authority and under the grantor of the power, whether it applies to real or personal property, in like manner as if the power, and the instrument executing the power, had been incorporated in one instrument." And in the same manner must be determined whether a power attempted to be executed by an instrument

was actually conferred or intended to be conferred by the other.

It seems to us, looking at what was evidently a well-matured and cherished plan for disposing of her estate, Theodocia Strother never expected or intended it to be wholly diverted from her sister and two brothers, and devised by her daughter for two schemes, one of which serves only to show silly vanity, while feasibility of the other she manifestly did not, nor could, situated as she was, with reasonable certainty count on; indeed, it does not now appear to be at all practicable.

But, independent of the general plan of the will, and manifest affection and desire of the testatrix to provide for her sister and two brothers, it seems to us the language used, properly construed, shows that the exercise of the power of appointment by Sally Williams Strother was intended to depend upon a condition that did not exist at the time she died.

In endeavoring to ascertain the true meaning of the language, it must be kept in mind that it was not a question with the testatrix whether she would invest her daughter with title to the estate; for that she had already given to a trustee, not being apparently willing to intrust her with control of more than the proceeds or profits. It must also be observed that next to making her independent and comfortable while living, the testatrix was solicitous for the estate at death of her daughter to go to her sister and brothers, or their heirs at law, and that the naked power of appointment was regarded a matter of secondary importance.

We need quote only the latter part of the will as follows: "In making this devise in the event of my daughter dying without issue and failing to make any disposition of the es-

tate, I have desired in the first place, to make her independent and comfortable, and, in the next place, to leave her *a memorial of my wishes as to its ultimate distribution, unless circumstances should alter*, of which she is to be the sole judge, not intending hereby to control her perfect freedom to do with it as she pleases at her death without issue."

It is apparent to us that the words "to leave to her a memorial of my wishes as to its ultimate distribution," were intended to be supplemental to the devise in terms already made to her sister and two brothers, and to indicate her wish, such devise should take effect, unless "circumstances should alter," and that the power of appointment was not to be exercised, except in that contingency.

What was nature of the "circumstances" in mind of testator she did not explain. It is, however, plausibly argued by counsel that she contemplated possible change in the relative pecuniary condition of her sister and two brothers, and the exercise in that case by her daughter of a special power of appointment. It is also probable she had in view another matrimonial venture by her daughter, in which case a general power of appointment might be persuasive with the other party. But whatever may have been the particular circumstances in mind of the testatrix, alteration of which was to give to her daughter a power of appointment, it is not stated in the will of the latter, nor does it otherwise appear, that there was any alteration or change of the condition or circumstances surrounding either the devisees or Sally Williams Strother; for she continued, up to her death, independent and comfortable, so far as profits of the estate could make her so, and also unmarried.

In our opinion exercise of the power of appointment in question was intended to be conditional, and as the event

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upon which it depended did not occur, the fifth clause of the will of Sally Williams Strother is void and ineffectual for any purpose.

Wherefore the judgment is reversed and cause remanded for further proceedings consistent with this opinion.

*CASE 108—PETITION ORDINARY—MAY 4, 1893.

McCain v. Louisville & Nashville Railroad
Company.

APPEAL FROM MARION CIRCUIT COURT.

NEGLIGENCE—RES JUDICATA.—A judgment for defendant in an action against a railroad company to recover damages for personal injuries alleged to have resulted from defendant's negligence is a bar to a subsequent action against the same defendant to recover damages for the same injuries, although the specific acts of negligence alleged in the two petitions are different, there being but a single transaction.

HUGH P. COOPER FOR APPELLANT.

The former adjudication is not a bar to this action. (Thomas v. Bland, 12 Ky. Law Rep., 640; Pepper v. Donnelly, 10 Ky. Law Rep., 140; Birch &c. v. Funk, 2 Met., 544.)

W. J. LISLE FOR APPELLEE.

The judgment in the former action to recover for the same injuries is a bar to this action. (Davis v. McCorkle, 14 Bush, 754; Chrisman v. Hunter, 3 Dana, 83; Talbott v. Todd, 5 Dana, 190; Gillon v. Wilson, 3 Mon., 217.)

JUDGE HAZELRIGG DELIVERED THE OPINION OF THE COURT.

In December, 1890, the appellant and one Greene were in a top buggy, and without listening or looking out for the

train—both being engaged in conversation and driving along in a “careless sort of way”—drove close up to railroad crossing of the appellee, when they discovered that the train was right at them. The horse they were driving became unruly and ran across the track. When across and in apparent safety, the whistle was very sharply blown, frightening the horse, so that he turned around. The buggy was thus upturned, and McCain severely injured. He, therefore, sued the company, charging that its train approached the public road-crossing at a dangerous rate of speed, without giving the usual and customary notice of its approach, whereby the appellant was decoyed so near the crossing that his horse became frightened and ran away, and the appellant injured.

The defendant company answered, denying not only the specific charges of negligence set forth in the petition, but also denying generally that by any negligence on its part it frightened the plaintiff's horse, caused it to run away, or caused or inflicted any injury to the plaintiff.

Upon the close of the plaintiff's testimony, the court instructed the jury to find for the defendant. Upon appeal to this court, that judgment was affirmed.

Thereafter the appellant instituted this action against the defendant, setting up as his cause of action the negligence of defendant's agents in giving an unusual and loud whistle of its engine after plaintiff had crossed the track in safety, and thus frightening the horse and causing the injury.

The injury thus complained of in this action is confessedly the same as that in the former suit, and we think the plea of *res adjudicata* was properly sustained by the lower court. The whole transaction was put in proof in the first action, and each and every act of the defendant company, on the

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occasion of the accident, was alleged in the answer not to be negligently done. The whole question of negligence, involving each and every act of the defendant, was, in fact, involved in the pleadings. But if not, they should have been put in issue by proper averments and pleadings. There was but a single transaction, a single cause of action, and there can be but one action.

Moreover, the plaintiff does not show himself entitled to any relief on the merits of his case. He shows no negligence on the part of the defendant, and as said in the former opinion in the case involving the same testimony, the appellant and his companion showed an utter want of precaution in approaching the crossing.

The judgment is affirmed.

*This case has only recently been ordered to be reported.

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ACTIONS—

As to equitable actions—SEE EQUITY.

As to right to sue officers or agents of State—SEE STATE.

Section 572 of Kentucky Statutes, even if valid, does not authorize an action by the Commonwealth to recover a penalty of a foreign corporation doing business in violation of its provisions. The remedy intended to be provided was by indictment and fine, and not by an action by the Commonwealth. *Commonwealth v. Jellico Coal Co.*246

ADMINISTRATORS—SEE EXECUTORS AND ADMINISTRATORS.

AD QUOD DAMNUM—

A corporation, whether municipal or private, seeking to appropriate a street or alley to its use must resort to the writ of *ad quod damnum*, and under it compensate the owner for the injury sustained. *Martin, &c., v. City of Louisville* 30

AGENTS—

As to rights and liabilities of agent to make collections—SEE BANKS, 5-10.

Where the cashier of a bank acted for the bank in discounting an accommodation note, his agency for the bank ceased when the bill was purchased, and the bank is not bound by his acts with reference to the proceeds. *Moreland's Ass'ee v. Citizens Savings Bank*211

AIDERS AND ABETTORS—

One indicted for murder may be convicted upon proof that he aided and abetted another. *Gaskins v. Commonwealth*494

ALIENATION—

Construction of devise forbidding sale of land—SEE DEVISE, 2.

ALLEGATION AND PROOF—

As to variance between —SEE INDICTMENT, 2, 6, 7.

ALLEYS—

As to closing of—SEE STREETS.

As to assessment for improvement of—SEE STREET IMPROVEMENTS.

ALTERATION OF INSTRUMENTS—SEE BILLS AND NOTES, 7, 8.

ANIMALS—

As to liability for injury done by vicious dog—SEE DOGS.

Appeals. Assessments for Street Improvements.

APPEALS—SEE APPEALS TO CIRCUIT COURT.

As to effect of opinion on former appeal—**SEE BILLS AND NOTES, 8.**

As to jurisdiction of Court of Appeals to grant original writ—**SEE COURT OF APPEALS.**

1. This court can not revise the judgment of the lower court in so far as it denies to one of the appellants a homestead as against certain mortgages, the pleading of the mortgagees not being before the court. *Finnell, &c., v. Higginbotham, Trustee* 21
2. An appeal from a judgment merely confirming a previous judgment which was final does not authorize this court to review the judgment thus confirmed, there being no appeal therefrom. *Idem.* 21
3. While the amount for which judgment was rendered against appellant was insufficient to give this court jurisdiction, yet, as the items pleaded by him as a counterclaim exceeded the sum of one hundred dollars, this court has jurisdiction of the appeal. *Arthurs v. Thompson* 218
4. In cases of equitable cognizance, such as fraud or mistake, if the testimony preponderates for the one side or the other in such a way as to convince the Court of Appeals the chancellor below has erred, his judgment will be reversed, although it may not be flagrantly against the evidence. *Farmers Bank of Kentucky v. Stapp* 432
5. This case having come to this court upon a petition for re-hearing filed in the Superior Court, this court is not bound by a construction which the Superior Court in its opinion on this appeal placed upon its opinion on the former appeal, but the original opinion will be considered and construed as if it were an opinion of this court, or as if the Superior Court had not attempted to construe it. *Cason v. Grant County Deposit Bank* 487

APPEALS TO CIRCUIT COURT—

1. The police court having no jurisdiction of a prosecution, the circuit court should, upon appeal by defendant, have dismissed the prosecution. *Klyman v. Commonwealth* 484
2. An appeal to the circuit court in an equity case should be placed on the equity docket. *Mocquot v. Meadows* 543

APPOINTMENT—

As to power of—**SEE POWERS.**

ASSESSMENTS FOR STREET IMPROVEMENTS—SEE STREET IMPROVEMENTS.

Assignment. Assignment for Creditors.

ASSIGNMENT—

The assignee of a note executed by a foreign corporation must obtain judgment and return of "no property" against the maker in the State where it was chartered, and where its property is, in order to hold the assignor liable upon its assignment. And the fact that the maker is insolvent, and that its property has been placed in the hands of a receiver, affords no excuse for the failure of the assignee to use this diligence. *Citizens' Nat'l Bank v. Hubbert, &c.*768

ASSIGNMENTS BY OPERATION OF LAW—

As to preferred claims in distribution of estate.—*SEE TRUSTS, 1.*

1. A general allegation, after specifying certain transfers, that the debtor has made "sundry other assignments and transfers to other persons unknown to plaintiffs, all in contemplation of insolvency and within six months," and calling on the debtor to disclose any and all such transfers, does not authorize the court to declare any transfer not specifically mentioned to operate as an assignment under the statute. *Bowers, Ass'ee, &c., v. The Huntington Bank, &c.*294
2. It is indispensable under the statute that the vendee, assignee or party receiving the benefit should be made a party to the petition and to the allegations attacking the particular transfer. *Idem.*...294
3. It must appear from the petition that it was filed within six months after the transfer complained of, either by a direct allegation to that effect, or by stating the time the transfer was recorded or sale made and property delivered, so that by reference to that statement and the time the petition was filed it shall appear to have been within the time limited. *Idem.*294
4. After the act of insolvency has been once established, then by operation of law all subsequent assignments and conveyances are subject to control by the courts with a view of finally distributing the estate of the debtor among all his creditors. *Idem.*....294

ASSIGNMENTS FOR CREDITORS—

1. Neither an assignee for the benefit of creditors, nor the creditors under a deed of assignment, are bona fide purchasers for value within the meaning of sec. 2087 of the Kentucky Statutes, which provides that estate aliened by the heir or devisee before suit brought shall not be liable to creditors in the hands of a bona fide purchaser for value, unless suit is instituted within six months. *Taylor, &c., v. Jones, &c.,*201
2. When the drawer of a check upon a bank makes an assignment for the benefit of creditors before the check is paid, the assignment

 Assignments for Creditors. Banks.

ASSIGNMENTS FOR CREDITORS—Continued.

passes to the assignee no interest in that part of the deposit thus appropriated, and the holder of the check may maintain an action upon it against the bank upon which it is drawn. *Farmers Bank & Trust Co. of Stanford, v. Newland*464

ASYLUM—

As to right to sue State Lunatic Asylum—**SEE STATE.**

ATTACHMENTS—

The power conferred upon the clerk to issue attachments may be exercised by a deputy. *Payton v. McQuown, Adm'r*757

ATTORNEY-GENERAL—

The Commonwealth's attorney of the district and not the attorney-general is the proper officer to bring a penal action in the name of the Commonwealth, when the jurisdiction is not in the Franklin Circuit Court. But, the fact that it is brought by the attorney-general will not invalidate the petition or affect the jurisdiction. *Commonwealth v. Grand Central B. & L. Ass'n*325

ATTORNEYS—

As to right to recover of another attorney's fee paid out for his benefit—**SEE VENDOR AND VENDEE, 3.**

1. Confusion in the order of argument of counsel to the jury, not sufficient to authorize the court to set aside the verdict. *Memphis, &c., Packet Co. v. Nagel* 9
2. Where counsel were allowed upon a trial for murder three hours to each side for the argument of the case to the jury, the court must conclude, the contrary not appearing, that this was not so short time as to prejudice the substantial rights of the defendant. *Combs v. Commonwealth* 24
3. The argument of the attorney for the Commonwealth in urging the jury by considerations of public policy to the enforcement of the criminal law, and to the conviction of the accused, was within the line of duty of a public prosecutor. *Breckinridge v. Commonwealth*267
4. The negligence or improper conduct of an attorney employed to defend a suit at law will not justify an injunction against the judgment. *Payton v. McQuown, Adm'r*757

BANKS—

As to exemption of banks from municipal taxation—**SEE TAXATION, 8.**

Banks.

BANKS—Continued.

1. Where at the maturity of a negotiable note, the bank at which it is made payable and to which it has been discounted has on general deposit for the principal in the note a sum more than sufficient for its payment, and, instead of applying from his unappropriated deposit a sum sufficient to pay the note, permits the entire deposit to be checked out, for other purposes, by the principal, who afterward becomes insolvent, a surety in the note is thereby discharged from liability. *Pursifull v. Pineville Banking Co.* 154
2. Where the cashier of a bank who acted for the bank in discounting an accommodation note induced the payee to apply the proceeds to the payment of certain insurance premiums in which he, the cashier, as agent of an insurance company, had an interest, which he knew to be a different purpose from that contemplated by the accommodation maker, these facts constitute no defense to the note in the hands of the bank, as the cashier's agency for the bank ceased when the bill was purchased, and the bank is not bound by his acts with reference to the proceeds. *Moreland's Ass'ee v. Citizens Savings Bank* 211
3. The fact that a notary public is cashier of and a stockholder in a bank does not prevent him from protesting a note held by the bank. *Idem.* 211
4. In this action against a bank to recover damages on account of defendant's negligent failure to collect a certificate of deposit issued to plaintiff by another bank, and which plaintiff had placed in defendant's hands for collection, the plaintiff alleging that defendant had surrendered the certificate to the payor, the petition was defective in failing to allege any fact showing that the alleged negligence had caused plaintiff to lose his debt. *Farmers Bank & Trust Co. of Stanford v. Newland* 464
5. When a customer deposits with a bank a note, bill of exchange, certificate of deposit or check, for collection at a point distant from the location of the bank, he does so with the implied understanding that the bank will follow the customary method in making such collection, which necessitates the selection of agents or correspondents at other points to carry out the undertaking, and the bank can only be held responsible for the exercise of due care and diligence in making such selection. *Idem.* 464
6. Although the defendant may have been negligent in sending the certificate by mail directly to the bank which issued it, yet, as it received in payment the check of that bank, plaintiff has not been damaged, provided defendant would have had the right to receive the check through an officer or an agent whom it might have selected for the purpose. *Idem.* 464

Banks.

BANKS—Continued.

7. The defendant had the right to receive in payment of the certificate the check of the payor, the Pineville Banking Company, upon the Louisville Banking Company, that mode of accepting payment being in accordance with defendant's usage. *Idem.*464
8. Except by agreement or usage a bank has no right to take anything but money in payment of paper it holds for collection. *Idem.*...464
9. The usage of a bank to accept checks in payment of claims it holds for collection is binding upon a customer, whether he has knowledge of the usage or not, in the absence of any direction by him as to the mode of payment. *Idem.*464
10. A check drawn upon a bank is an absolute appropriation by the drawer of so much money in the hands of the banker to the holder of the check, to remain there until called for, and can not after notice be withdrawn by the drawer. Therefore, where the drawer after drawing the check and before it is paid, makes an assignment for the benefit of his creditors, the assignment passes to the assignee no interest in that part of the deposit thus appropriated, and the holder of the check may maintain an action upon it against the bank upon which it is drawn. *Idem.*464
11. A bank has no right to set off against a depositor's check the amount of an unmatured note which it holds against the depositor, although the depositor is insolvent and the bank will otherwise lose its debt. *Merchants' Nat'l Bank v. Robinson & Co.*552
12. The president of a bank may be held liable in an action for deceit for a false statement of material matters affecting the value of the stock of the bank (1) where he has actual knowledge that the statement is false; (2) where the false statement is made without any reasonable knowledge *bona fide* to believe it to be true; (3) where it is made in reckless disregard of its truth or falsity. Provided always that the party complaining and to whom damage has resulted has relied on such false statement in making the contract complained of. *Trimble v. Reid*713
13. While there may be cases of constructive knowledge or of imputed knowledge on the part of the president and directors of a bank sufficient to hold them liable for false statements made, yet the facts on which this constructive knowledge is made to depend should be found by a jury under appropriate instructions and not be assumed by the court. conclusively to exist. *Idem.*713
14. Liability of president of bank for false statement as to condition of bank, made to a director of the bank, who was acting as agent for another in the purchase of stock. *Trimble v. Ward*748
15. A higher degree of diligence is required of the president of a bank than of the other directors. *Idem.*748

 Bar. Bills and Notes.

BAR—

In criminal cases—SEE FORMER JEOPARDY.

In civil cases—SEE RES JUDICATA.

BILLS AND NOTES—

1. When a corporation has used the proceeds of a note in its business it can not escape liability on the note upon the ground that its president had no power to discount the paper. *German National Bank v. Butchers' Hide and Tallow Co.*..... 34
2. Mistakes in the execution of negotiable paper may always be corrected unless the rights of third parties have intervened. *Idem*, 34
3. When at the maturity of a negotiable note the bank at which it is made payable and to which it has been discounted has on general deposit for the principal in the note a sum more than sufficient for its payment, and instead of applying from this unappropriated deposit a sum sufficient to pay the note, permits the entire deposit to be checked out for other purposes by the principal, who afterwards becomes insolvent, a surety in the note is thereby discharged. *Pursifull v. Pineville Banking Co.* 154
4. If a note be made for general accommodation without restriction as to its use, the party accommodated has the right to sell it and receive the proceeds, and the fact that he fails to appropriate the proceeds according to a prior agreement constitutes no defense for the accommodation maker. *Moreland's ass'ee v. Citizens' Saving Bank* 211
5. Notice of protest sufficient. *Idem* 211
6. The fact that a notary is the cashier of and a stockholder in a bank does not prevent him from protesting a bill held by the bank. *Idem* 211
7. Where a note is signed and delivered to the payee with a blank, left apparently for the purpose of being filled with the place of payment, the payee has implied authority to fill the blank, and if he does fill it with the name of a bank and then negotiate the paper the maker will not be allowed to show as against a *bona fide* holder for value without notice of any infirmity in the paper that the payee had no authority to fill the blank. *Cason v. Grant County Deposit Bank* 487
8. In this action upon a note made "payable at the Bank of Williamstown," it having been held by the Superior Court upon a former appeal that a good defense was presented by an answer alleging that the word "payable" and the words "the Bank of Williamstown" were inserted by the payee without defendant's authority or knowledge, after the paper was signed and delivered, and that it was not necessary for defendant to allege that plain-

 Bills and Notes. Bridges.

BILLS AND NOTES—Continued.

tiff had notice of the infirmity in the paper, plaintiff bank had the right upon the return of the case to the lower court to plead by way of reply that it discounted the paper in good faith at the instance of the payee before maturity, without any notice of the fact that the blanks had been filled up by the payee or any one else, and that the paper when discounted was perfect as to date, amount and place of payment, the plaintiff not being precluded by the opinion of the Superior Court from making such a reply to the defendant's plea of *non est factum*. *Idem*. 487

BONA FIDE PURCHASERS—

An assignee for the benefit of creditors is not a purchaser for value. Taylor, &c. v. Jones, &c. 201

BONDS—

As to municipal bonds—SEE TOWNS AND CITIES, 1-5.

As to necessity for execution of bond in proceeding for sale of land under section 491 of Civil Code—SEE JUDICIAL SALES, 1. Sec. 16 of the Civil Code of Practice, which requires a plaintiff who is a corporation to give bond for costs, applies to private corporations alone and not to public corporations, and, therefore, does not apply to the trustees of a common school district. Trustees of Common School District v. City of Flemingsburg 702

BREACH OF PEACE—

A conviction in a police court for a breach of the peace by firing off pistols in the streets of a city is a bar to an indictment for willfully and maliciously injuring the county court house by the same acts. Reddy v. Commonwealth 734

BRIBERY—

1. One who bribes another to vote in a particular way at an election held to take the sense of the voters of a precinct as to the sale of liquor therein is guilty of bribery under section 1587 of the Kentucky Statutes. Commonwealth v. Steele 27
2. To constitute the offense of bribery the person receiving the reward, benefit or advantage must be influenced or be intended to be influenced thereby not merely to vote at an election, but to vote for a particular candidate or ticket, or upon a particular side of a question submitted, and the indictment must be direct and certain as to that matter. *Idem*. 27

BRIDGES—

City liable for injuries resulting from collisions of vehicles caused by

Bridges. Carriers.

BRIDGES—Continued.

defective construction of bridge. *City of Louisville v. Garr, by, &c.*585

BURDEN OF PROOF—

The burden of proof is on the party who would be defeated if no evidence were offered on either side; and is fixed at the beginning of the trial by the nature of the allegations in the pleadings, and does not change during the course of the trial.

Where a city ordinance was passed providing for the annexation to the city of an adjoining town, and certain residents of the town filed a petition in the circuit court protesting against the annexation, the burden of proof was upon the petitioners, and they were entitled to the concluding argument to the jury. The fact that the court found at the conclusion of the testimony that the required per cent. of the resident free-holders of the territory proposed to be annexed had remonstrated did not change the burden of proof. *Kentucky Wagon Manufacturing Co. v. City of Louisville*548

CARRIERS—

As to railway passenger carriers—SEE RAILROADS, 11-15, 24.

1. Where a common carrier accompanies his violation of contract with a passenger with willful and wanton oppression or violence, or unlawful personal restraint, or conduct insulting in word, tone or manner, he becomes liable to all the remedies of the law against tort-feasors, including the liability to pay punitive damages.

This rule applied in an action against a packet company, a common carrier, to recover damages on account of defendant's failure to stop its boat and put plaintiff off at the place for which she had purchased and presented a ticket, and finally putting her off at a strange place. *Memphis, &c., Packet Co. v. Nagel* 9

2. A corporation as well as a natural person may be held liable in punitive damages for injuries inflicted by the tortious acts of their employees committed within the scope of their authority. *Idem* 9
3. It was proper for the court to authorize the jury to consider in estimating damages such bodily and mental suffering as was proximately caused by the acts of defendant. *Idem*..... 9
4. The owner and manager of an elevator for passengers is to be treated as a public carrier of passengers, and is subject to the same responsibilities as a railway passenger carrier. Therefore the law holds him to the utmost diligence and care of very cautious persons, and responsible for the slightest neglect. *Kentucky Hotel Co. v. Camp*.....424

 Carriers. Codes of Practice.

CARRIERS—Continued.

5. In an action against the owner of an elevator to recover damages for personal injuries to a passenger a verdict for defendant upon a former trial was properly set aside because of error of the court in failing to define the degree of care, skill and diligence necessary to be used in operating an elevator. *Kentucky Hotel Co. v. Camp*424

CHECKS—SEE BANKS, 9, 10, 11.

CHILDREN—

As to jurisdiction to determine custody of—**SEE JURISDICTION, 1.**
 Proper instruction as to contributory negligence in action to recover damages for injuries to boy seven years of age. *Kentucky Hotel Co. v. Camp*424

CITIZENS—

As to rights of foreign corporations as citizens—**SEE CORPORATIONS, 4.**

CLERKS—

The power conferred upon the clerk of the circuit court to grant an injunction can not be exercised by his deputy. But the power to issue attachments may be exercised by a deputy. *Payton v. McQuown, Adm'r*757

CODES OF PRACTICE—

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Section 97, subsec. 4	220
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Codes of Practice. Common Schools.

CODES OF PRACTICE—Continued.

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COLLUSION—

A trial by collusion of the accused and the officers is of no validity, and affords the accused no protection. *Reddy v. Commonwealth*784

COMMERCE—

As to regulation of—**SEE INTER-STATE COMMERCE.**

COMMISSIONS—

Of administrator and guardian—**SEE EXECUTORS AND ADMINISTRATORS, 4.**

COMMON SCHOOLS—

1. The legislature has power to provide, as it has done by section 4371, Kentucky Statutes, that the expenses of the department of education, of whatever character or kind, shall be paid out of the common school fund. *Superintendent of Public Instruction v. Auditor of Public Accounts*.....180
 2. Statute requiring a corporation who is a plaintiff to give bond for costs does not apply to public corporations such as the trustees of a common school district. *Trustees of Common School District v. City of Flemingsburg*.....702
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Commonwealth's Attorneys. Conflict of Laws.

COMMONWEALTH'S ATTORNEYS—

As to misconduct in argument to jury—*SEE ATTORNEYS*, 3.

A penal action the jurisdiction of which is not in the Franklin Circuit Court must be brought by the Commonwealth's attorney for the district in which it is instituted. But if brought in the proper court the fact that it is brought by the attorney-general will not invalidate the petition or affect the jurisdiction. *Commonwealth v. Grand Central B. & L. Ass'n.*.....325

COMPROMISE—

As to surrender of part of claim in ignorance of legal rights—*SEE INSURANCE*, 3.

CONDITIONAL SALES—

Where a mortgagor being unable to pay the mortgage debt executed to the mortgagee an absolute conveyance of the mortgaged land, the mortgagee surrendering the evidence of his debt and executing to the mortgagor a writing agreeing to re-convey to him the land if he should pay the debt within twelve months, these writings must be regarded as evidencing a conditional sale and not a new mortgage, and the debtor failing to pay the debt within the time allowed, the absolute fee to the land passed to the creditor. While a conveyance of this character in case of doubt is to be construed as a mortgage, there is no doubt in this case that a conditional sale was intended. *Tyget &c. v. Potter & Co.*..... 54

CONDITIONS—

No necessity exists for a re-entry in order to avoid an estate which has been defeated by the breach of a condition subsequent in a deed. *Griffith &c. v. Owensboro &c. R. Co.*.....139

CONFLICT OF LAWS—

1. Where a debtor residing in this State goes into another for temporary purposes of business or pleasure, taking with him personal property which is exempt from execution or attachment under the laws of this State, but which is not exempt under the laws of the State into which it is taken, a creditor residing in this State has no right to follow him and subject the property, and if he does so the debtor is entitled to recover damages. *Stewart v. Thomson*575
2. The courts of this State have the power, and it is their duty, to enjoin citizens of the State within their jurisdiction from evading the laws of the State through the machinery of the law or courts of a foreign State. *Idem.*.....575

Conflict of Laws. Constitutional Law.

CONFLICT OF LAWS—Continued.

3. Exemption laws have no force beyond the territorial limits of the State enacting them, hence a citizen of one State when his property is levied on in another State can not plead with effect the exemption laws of his own State. *Idem*.....575

CONSPIRACY—

- Two or more persons jointly indicted may testify for each other although a conspiracy is charged and proved. *Kidwell v. Commonwealth*538

CONSTITUTIONAL LAW—

As to election and terms of city officers, and filling of vacancies—SEE ELECTIONS.

As to limit of indebtedness that may be incurred by cities—SEE TOWNS AND CITIES, 1, 2.

As to sections of constitution construed—SEE CONSTITUTION OF KENTUCKY.

1. An act of the legislature providing that the council of the city of Augusta may issue bonds of the city to a certain amount in aid of any railway company that will construct a railroad through the city, provided a majority of the voters of the city shall vote in favor thereof at an election held for that purpose, relates to the powers and duties of the governing body of the city, and the subject is sufficiently expressed by the title: "An act to amend the charter of the city of Augusta." *Board of Trustees of Augusta v. Maysville &c. R. Co.*.....145
2. The constitution does not limit the use of the common school fund to the payment of teachers of the common schools, and the legislature has the power to provide, as it has done in section 4371, Kentucky Statutes, that the expenses of the department of education of whatever character or kind shall be paid out of that fund. *Superintendent of Public Instruction v. Auditor of Public Accounts*180
3. A State has no power to require a foreign corporation, as a condition precedent to its right to do business in the State, to surrender its privileges of suing in the Federal courts and of removing causes against it from the State to the Federal courts, those privileges being guaranteed to it as a citizen of another State by the constitution and laws of the United States.
Commonwealth v. East Tenn. Coal Co.238
Commonwealth v. Jellico Coal Co.246
4. The General Assembly has power to provide for the election of city councilmen by wards. *Brown, &c., v. Holland, &c.*249

Constitutional Law.

CONSTITUTIONAL LAW—Continued.

5. While the general rule is that the legislature can not deputize others to perform its governing functions, yet it may delegate to municipal and other public corporations some portion of its own powers for local purposes. Therefore, under section 160 of the constitution, which provides that mayors of towns of the fourth, fifth and sixth classes "may be elected or appointed, as provided by law," the legislature has power to provide, as it has done as to cities of the fourth class, that "the mayor may be selected by the people or appointed by the council, as may be provided by ordinance." Nor is this provision in violation of section 156 of the constitution, requiring the organization and powers of each class of cities "to be defined and provided by general laws so that all municipal corporations of the same class shall possess the same powers and be subject to the same restrictions." *Idem.* . . 249
6. A tax collector is not required to be a resident of the district in which the taxes are to be collected, he not being a "district officer" within the meaning of section 234 of the constitution. *Commonwealth v. Blackwell* 314
7. Notwithstanding the declaration of a board of councilmen in electing a police judge that his term would expire at a certain time, his term would not then have expired if the constitution had fixed a longer term. *Boyd v. Land* 379
8. A constitutional provision fixing the terms of police judges *elected* applies to such officers *appointed* or elected by a city council. *Idem* 379
9. Where the constitution provides that no person shall be "eligible" to a particular "office" unless he possesses certain qualifications, it is sufficient that a person elected to the office possesses the required qualifications at the time fixed for taking the office, unless it is expressly provided that he shall possess them at the time of the election. Therefore, when a person elected to the office of clerk of a court has at the time fixed for taking the office the certificate of qualification prescribed by section 100 of the constitution he is entitled to hold the office although he did not have the certificate at the time of the election. *Kirkpatrick v. Brownfield* 558
10. The expression "eligible to election" being used in some parts of the constitution, and the expression "eligible to office" in others, it is to be supposed that by the difference in expression a difference in meaning was intended. *Idem.*..... 558
11. A statute authorizing the taxation of banks by towns and cities impairs the obligation of a contract made by the State with the banks exempting them from municipal taxation, and the statute

 Constitutional Law. Constitution of Kentucky.

CONSTITUTIONAL LAW—Continued.

- is therefore void. Commonwealth for use, &c., v. Farmers' Bank of Kentucky590
12. While under the former constitution the power to make such a contract existed, the power does not exist under the present constitution. *Idem*590
13. The power of the legislature to repeal an act does not carry with it the power to annul a contract made under the act. *Idem*...590
14. Statute creating office of indexer of public records for Jefferson county and empowering judges to appoint is not unconstitutional. *Roberts v. Cain*722
15. The act of March, 20, 1880, entitled, "an act to prohibit the sale of spirituous, vinous or malt liquors or mixtures of either in the Seventh magisterial district of Pendleton county," relates to but one subject. *Brann v. Hart, &c.*735
16. Neither general nor local prohibitory liquor laws which were in force at the time of the adoption of the present constitution were repealed by that instrument. *Idem*.....735
17. Sec. 157 of the constitution, in so far as it limits the indebtedness of counties and taxing districts, does not require legislation to give it effect. Therefore a county can not incur an indebtedness in excess of that limit without submitting the question to a vote of the people as provided in that section. *O'Mahoney v. Bullock &c.*774

CONSTITUTION OF KENTUCKY—

Provisions cited, construed &c.

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 Constitution of Kentucky. Contribution.

CONSTITUTION OF KENTUCKY—Continued.

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Section 201	690
Section 234	316

CONSTRUCTIVE KNOWLEDGE—

On part of president and directors of bank—**SEE BANKS, 13.**

CONSTRUCTIVE SERVICE OF PROCESS—

As to affidavit for warning order—**SEE WARNING ORDER.**

As the defendants were before the court only by constructive service, the court should have required proof of the allegation that the land could not be partitioned without materially impairing its value. But as the court had jurisdiction and the land has been sold, the purchaser can not now be disturbed. *Perkins, &c., v. McCarley, &c.*43

CONTINUANCE—

When the accused seeks a continuance on account of the absence of a material witness, in determining whether he has used due diligence to secure the attendance of the witness, the fact that the Commonwealth had the witness recognized to appear, should have the same effect as if the witness had been recognized at the instance of the accused, and no further diligence is necessary to be shown. *Saylor v. Commonwealth*184

CONTRACTS—

As to validity of contract by State exempting bank from taxation—**SEE TAXATION, 8.**

A city may make its bonds payable in gold. *Farson, Leach & Co. v. Board of Com's'rs of Sinking Fund of City of Louisville*120

CONTRIBUTION—

As to contribution between joint wrong-doers—**SEE RAILROADS, 13, 14.**

Contributory Negligence. Corporations.

CONTRIBUTORY NEGLIGENCE—SEE NEGLIGENCE, 3, 4.

CONVEYANCES—SEE DEEDS.

CORPORATIONS—

Liability of president and directors of bank for false statement as to its condition—SEE BANKS, 12, 13, 14, 15.

Liability for punitive damages—SEE DAMAGES, 2.

1. A stockholder in a corporation may testify in chief for the corporation after persons having no interest in the corporation have given testimony in chief in its behalf. *Western District Warehouse Co. v. Hayes* 16
2. A corporation must account for benefits which it has received under an *ultra vires* transaction. Therefore, where it has used the proceeds of a note in its business it can not escape liability on the ground that its president had no power to discount the paper. *German Nat'l Bank v. Butchers' Hide and Tallow Co.* 34
3. The "rights, privileges and powers" of one corporation conferred upon another does not embrace the privilege of immunity from taxation. *Nashville, &c., R. Co. v. Commonwealth* 162
4. A State has no power to require a foreign corporation, as a condition precedent to its right to do business in the State, to surrender its privileges of suing in the Federal courts and of removing causes against it from the State to the Federal courts, those privileges being guaranteed to it as a citizen of another State by the constitution and laws of the United States.
Commonwealth v. East Tenn. Coal Co. 238
Commonwealth v. Jellico Coal Co. 246
5. When the name of a corporation is changed, either real or personal property held by it in its old name may be recovered by it in its new name without any transfer of title. Besides, as the defendant in this case contracted with the corporation in its new name, it is estopped to deny its title. *McCloskey, Bishop, v. Doherty, &c.* 300
6. The jurisdiction of a penal action in the name of the Commonwealth against a corporation to recover the penalty prescribed for doing business in this State without complying with the provisions of sec. 571 of the Kentucky Statutes, is in the circuit court of the county in which the offense is committed. Therefore, the Franklin Circuit Court has no jurisdiction of such an action, unless the offense was committed in Franklin county. *Commonwealth v. Grand Central B. & L. Ass'n* 325
7. An incorporated lunatic asylum controlling property of the State in such a way as to create a nuisance is liable for the injury just

Corporations. Counter-Claim and Set-Off.

CORPORATIONS—Continued.

- as any natural person acting as agent or officer of the State would be liable. *Herr, &c., v. Central Kentucky Lunatic Asylum* ..458
8. The power conferred upon the legislature by the act of 1856 to repeal all grants to corporations does not give the power to divest contract rights acquired under such grants. *Bank Tax Cases*.590
 9. A court of equity has jurisdiction in an action by the State to enjoin a corporation from exceeding its chartered powers, or doing acts otherwise illegal and injurious to the public. *L. & N. R. Co. v. Commonwealth*675
 10. Franchises and privileges not in express terms granted to a corporation are to be regarded as withheld. *Idem*675
 11. A provision in the charter of a railroad company authorizing it to purchase other roads can not be regarded as conferring power to purchase parallel and competing lines, but must be construed with reference to the subject matter, which was branch roads. *Idem.*675
 12. Although a railroad company may have by its charter power to purchase parallel and competing lines, it can not purchase and hold a parallel and competing road belonging to a company whose charter forbids such a consolidation. *Idem.*675
 13. Statute requiring a corporation who is a plaintiff to give bond for costs does not apply to public corporations such as the trustees of a common school district. *Trustees of Common School District v. City of Flemingsburg*702

COSTS—

- Statute requiring a corporation who is a plaintiff to give bond for costs does not apply to public corporations such as the trustees of a common school district. *Trustees of Common School District v. City of Flemingsburg*702

COUNSEL FEES—

As to right to recover of another counsel fees paid out for his benefit—SEE VENDOR AND VENDEE, 3.

COUNTER-CLAIM AND SET-OFF—

1. The fact that the defendant's pleading is improperly styled an "answer and counter-claim," instead of an "answer and set-off," does not deprive him of the right to such relief as he may show himself entitled to. And it was error in this case to strike out, on plaintiff's motion, so much of defendant's pleading as asserted a "counter-claim," although the items of indebtedness thus

Counter-Claim and Set-Off. Courts.

COUNTER-CLAIM AND SET-OFF—Continued.

- pleaded properly constituted a set-off and not a counter-claim.
 Arthurs v. Thompson218
2. Claims which neither arise out of the transactions set forth in the petition nor have any connection with the subject of the action can not be pleaded as a counter-claim. *Idem.*218
3. Although the claims asserted by defendant do not arise out of any express contract, yet as the facts alleged raise an implied promise to pay, the claims are properly pleadable as a set-off. *Idem.* .218

COUNTERFEIT MONEY—

As to indictment for passing—SEE INDICTMENT, 9.

COUNTIES—

Recitals of statute as to population of—SEE STATUTE, 13.

As to constitutional limitation upon indebtedness of—SEE CONSTITUTIONAL LAW, 17.

As to purchase of turnpikes by—SEE STATUTES, 16.

COURT OF APPEALS—

Sec. 110 of the present constitution gives to the Court of Appeals plenary power to issue writs in every case where necessary to give it control of inferior jurisdictions. And while this court having discretion ought not generally to issue writs of prohibition when adequate relief can be afforded by exercise of its revisory power, yet this is a proper case for the writ, and it is granted. But a motion for a mandamus is denied. *Hindman, &c., v. Toney*413

COURT-HOUSE—

A conviction in a police court for a breach of the peace by firing off pistols in the streets of a city is a bar to an indictment for willfully and maliciously injuring the county court-house by the same acts. *Reddy v. Commonwealth*784

COURTS—

As to jurisdiction of Franklin Circuit Court—SEE JURISDICTION, 2, 4.

As to jurisdiction of county court to appoint committee for imbecile—SEE IMBECILES.

As to election of special judge in Jefferson Circuit Court—SEE JUDGES, 2.

As to transfer of suits from one branch of Jefferson Circuit Court to another—SEE TRANSFER OF SUITS.

 Courts. Dam.

COURTS—Continued.

As to power of Court of Appeals to grant writs of prohibition and Mandamus—**SEE COURT OF APPEALS.**

As to jurisdiction of police courts—**SEE JURISDICTION, 5.**

CRIMINAL LAW—SEE BRIBERY; EMBEZZLEMENT; HOMICIDE; ROBBERY.

As to jeopardy—**SEE FORMER JEOPARDY.**

As to practice—**SEE PRACTICE IN CRIMINAL CASES.**

As to indictment—**SEE INDICTMENT.**

1. Keeping a disorderly house is a common-law offense, and to keep such a house is not an indictable offense unless it be laid as a common nuisance. *Commonwealth v. Bessler*498
2. A conviction in a police court for a breach of the peace by firing off pistols in the streets of a city is a bar to an indictment for willfully and maliciously injuring the county court-house by the same acts. *Reddy v. Commonwealth*784

CROSS-PETITION—

Where land was sold under decree of court as that of a debtor, who in fact owned only an undivided three-fourths interest, the owners of the other one-fourth not being before the court, and the purchaser of one of two tracts into which the land was divided, brought his action against the owners of the one-fourth interest to quiet his title, denying that defendants had any interest, an answer filed by defendants, asserting their claim, was properly made a cross-petition against the purchasers of the other of the two tracts into which the land was divided. *Loughridge v. Ca-wood, &c.*533

CUSTOM—As to binding force of—SEE BANKS, 5, 7, 8, 9.

In this action to recover the value of tobacco destroyed by fire while on storage in defendant's warehouse, the plaintiff's case being based upon an alleged custom which made it the duty of the defendant to keep the tobacco insured for plaintiff's benefit, the plaintiff can not recover if he was notified that the tobacco was held subject to his risk, even if the custom might otherwise have applied, and the defendant upon the return of the case should be allowed to make that defense, and the jury instructed accordingly. *Western District Warehouse Co. v. Hayes* 16

DAMS—

Maintenance of a dam across a stream will be enjoined where it creates a nuisance resulting in injury to health and property. *Herr, &c., v. Central Kentucky Lunatic Asylum*458

 Damages. Decedents' Estates.

DAMAGES—

As to proximate cause—SEE RAILROADS, 9, 10.

1. In an action against a packet company, a common carrier, to recover damages on account of defendant's failure to stop its boat and put plaintiff off at the place for which she had purchased a ticket, and finally putting her off at a strange place, an instruction as to punitive damages was proper. *Memphis, &c., Packet Co. v. Nagel* 9
2. A corporation as well as a natural person may be held liable in punitive damages for injuries inflicted by the tortious acts of their employes committed within the scope of their authority. *Idem.* 9
3. It was proper for the court to authorize the jury to consider in estimating damages such bodily and mental suffering as was proximately caused by the acts of defendant. *Idem.* 9
4. In an action against a railroad company to recover for the death of a brakeman the court properly told the jury that the criterion of damages was the power of the decedent to earn money had he lived, not exceeding the amount claimed. *Cincinnati, &c., R. Co. v. Sampson's Adm'r* 65
5. Verdict for \$1,000 for ejection of passenger from railroad train not excessive. *Chesapeake, &c., R. Co. v. Osborne* 112
6. The general rule in tort actions is that if the defendant act maliciously, wilfully, or with such gross negligence as to indicate a wanton disregard of the rights of others, the jury may award punitive damages.

In an action to recover for injury done by a vicious dog the jury may give punitive damages if the owner had knowledge of the fact, prior to the injury, that the dog was vicious towards persons. *Koestel v. Cunningham* 421

DEBTOR AND CREDITOR—

As to preference of creditors—SEE ASSIGNMENTS BY OPERATION OF LAW.

DECEDENTS' ESTATES—

1. Where a testator was surety for a debt of one of the devisees, the other devisees had the right to require that that devisee's interest should be subjected to the payment of the debt for which the testator was bound as his surety, and their equity is superior to that of creditors of their co-devisee claiming under a deed of assignment from him. *Taylor, &c., v. Jones, &c.* 201
2. Neither an assignee for the benefit of creditors nor the creditors under a deed of assignment are *bona fide* purchasers for value within the meaning of sec. 2087 of the Kentucky Statutes, which provides that estate aliened by the heir or devisee before suit

Decedents' Estates. Definitions.

DECEDENTS' ESTATES—Continued.

brought shall not be liable to creditors of the decedent in the hands of a *bona fide* purchaser for value unless suit is instituted within six months. Taylor, &c., v. Jones, &c.201

DECEIT—

As to liability of bank president for false statement as to condition of bank—SEE BANKS, 12, 13, 14, 15.

DEEDS—

As to conveyances in fraud of creditors—SEE FRAUDULENT CONVEYANCES.

As to effect of covenant of general warranty—SEE WARRANTY, 1.

1. No necessity exists for a re-entry in order to avoid an estate which has been defeated by the breach of a condition subsequent in a deed. Griffith, &c., v. Owensboro, &c., R. Co.139
2. The court is inclined to the opinion that the statute requiring the maker of a trust to unite with trustees in deed executed by him does not apply to a deed executed by a trustee for creditors where the wife of the debtor united with her husband in the deed creating the trust, thus indicating a purpose on their part to surrender all interest in the property and in the execution of the trust. Halley, &c., v. Winchester Diamond Lodge438

DEFINITIONS—

1. Word *person* in statute construed as synonymous with *party to action*. Western District Warehouse Co. v. Hayes..... 16
2. The words *may issue bonds* used in statute construed as *shall issue bonds*. Board of Trustees of Augusta v. Maysville &c. R. Co.145
3. Word *floods* in city ordinance construed as synonymous with *high water*. *Idem*.145
4. Words *water closet* and *privy* used in statute with same meaning. Lou. & Nash. R. Co. v. Commonwealth207
5. Expression *net proceeds* in will construed as *net profits*. Blankenbaker v. Woodruff &c.276
6. A tax collector is not a *district officer* within the meaning of sec. 234 of the constitution. Commonwealth v. Blackwell.....314
7. The word *election* in a statute used by mistake for the word *electors*. Boyd v. Land379
8. A constitutional provision fixing the terms of police judges *elected* applies to such officers *appointed* by city council. *Idem*.....379
9. *License tax* defined. Levi v. City of Louisville394

Definitions. Devise.

DEFINITIONS—Continued.

10. *Disorderly house* defined. *Commonwealth v. Bessler*498
11. Expression *eligible to office* in constitution construed. *Kirkpatrick v. Brownfield*.....558
12. Word *Act* (of legislature) used in sense of *Article*. *Bank Tax Cases*590
13. Word *parallel* as used in constitution with reference to railroads defined. *L. & N. R. Co. v. Commonwealth*.....675

DEPUTIES—The power conferred upon the clerk of the circuit court to grant an injunction can not be exercised by his deputy. *Payton v. McQuown, Adm'r*757

DESCENT AND DISTRIBUTION—

1. Where a testator devised to his two sons in trust for their children "equal interests" in a house and lot, upon the death of a child of one of the sons, one-half his share passed under the statute to his father and mother, and the father having since died, the mother is entitled in fee to one-half of the interest which thus passed to her and the father, and is entitled to dower in the other half. *Butler &c. v. Butler &c.*.....136
2. Where a testator was surety for a debt of one of the devisees the other devisees had the right to require that that devisee's interest should be subjected to the payment of the debt for which the testator was bound as his surety, and their equity is superior to that of creditors of their co-devisee claiming under a deed of assignment from him. *Taylor &c. v. Jones &c.*.....201

DEVISE—

As to rights of devisees against co-devisee who is indebted to testator's estate—SEE DECEDENTS' ESTATES, 1.

1. When an estate is given or devised generally or indefinitely with a power of disposition the fee passes, and a remainder to take effect in the event the estate is not disposed of is void. It is only where the interest of the first taker is expressly limited to a life estate that the power of disposition does not carry the fee, and that the remainder can take effect in the event there is no disposition of the estate by the first taker. *McAllister v. Bethel*..... 1
2. The fact that a testator provides that land devised to one person for life, remainder to others, shall remain in possession of the life tenant as long as he lives, and at his death be sold and the proceeds divided among the remainder-men, can not be regarded as forbidding a sale of the land during the life of the life tenant for the purpose of reinvestment, as provided by sec. 491 of the Civil Code. *Luttrell v. Wells, &c.* 84

Devise.

DEVISE—Continued.

3. Where a testator devised to his two sons in trust for their children "equal interests" in a house and lot, the children of the sons took *per stirpes* and not *per capita*, as the gift of the "equal interests" was to the two sons, each holding his share in trust for his children. *Butler &c. v. Butler &c.*.....136
4. Upon the death of a child of one of the sons, one-half his share passed under the statute to his father and mother, and, the father having since died, the mother is entitled in fee to one-half of the interest which thus passed to her and the father, and is entitled to dower in the other half. *Idem*.....136
5. Under a devise by a testator to his widow for life, remainder to his daughters "for their benefit and the benefit of the heirs of their natural bodies up to the age of thirty years on the part of each of said heirs of their natural bodies," the daughters did not take merely a life estate, remainder to their children, but each took a fee simple estate, to be joint with her children, if she had any, otherwise to be absolute, and the limitation as to age, as explained by a codicil, was intended merely to postpone the right of control and alienation upon the part of the children of the daughters until they should reach the age of thirty years, thus continuing the disability of infancy until then. *Blankenbaker v. Woodruff &c.*276
6. Under a devise by the testator to his wife of one-third of the "net proceeds" of a tract of land, she took merely one-third of the net profits for life and had no interest which she could devise. *Idem*276
7. Where a testatrix after devising all her estate to one of two sisters directed her to give to the other sister "any present that she may need and that my estate can afford," these words were too uncertain to create an enforceable trust. To create a trust it is not sufficient that the words of the testator can be construed as mandatory, and that the person intended to be the beneficiary is certain, but the subject to which the obligation relates must also be certain. *Webster &c. v. Wathen &c.*.....318
8. Where a testator devised to a granddaughter, one of five children of a deceased daughter, one-fifth part of certain land, "to make her one equal portion with her brother and sisters, and at her death to her child or children, and if she leave none, to her brother and sisters," with the same limitation over as to the share of each of the other grandchildren, upon the death of the granddaughter without issue her share passed not merely to her surviving brother and sisters, but also to the child of a sister who had died since the testator, that child taking by descent the inter-

Devise. Disorderly House.

DEVISE—Continued.

- est which her mother, if living, would have taken, the interest of each of the original devisees in the share of any one of them that might die without issue being so far a vested interest as to be descendible. *Graves, &c., v. Spurr, Trustee*651
9. All contingent estates of inheritance as well as springing and executory uses and possibilities coupled with an interest, when the person to take is certain, are transmissible by descent, and are devisable and assignable. If the person be not ascertained then they can not be either devised or descended at the common law. This uncertainty as to the person is usually held to arise where the estate is given over, after a life estate, to the survivor of a class of persons, but that is not the case here. *Idem.*651
10. All wills speak as of the date of the death of the testator, and must be interpreted in the light of all the surrounding facts and circumstances, considering the estate in hand and the objects of the testator's bounty. *Idem.*651
11. Every testator in making his will should be presumed to know the law of his domicile with reference to devises and also the law of descents. *Idem.*651
12. A power of appointment conferred by a mother upon her daughter by will was not absolute and unconditional, but was to be exercised only in the event "circumstances should alter." *Morgan, &c., v. Halsey, Trustee*789

DIRECTORS—

Liability of for false statement as to condition of corporation—SEE BANKS, 12, 13, 14, 15.

DISABILITY—

As to sales of real property of persons under—SEE JUDICIAL SALES, 1, 2.

DISORDERLY HOUSE—

1. Keeping a disorderly house is a common law offense and to keep such a house is not an indictable offense, unless it be laid as a common nuisance. *Commonwealth v. Bessler*498
2. The offense of keeping a disorderly house consists of a repetition of improper conduct and to constitute a good indictment for that offense words must be used which show the repetition or frequency of the acts complained of, as that the acts were done on a day certain "and on divers other days and times," etc. It is not sufficient to allege that the acts were done "on the — days of —, 1894, and before the finding of the indictment." *Idem.* 498

 Divorce. Dying Declarations.

DIVORCE—

The court which has rendered judgment granting a divorce and providing for the care and custody of the infant children of the marriage alone has jurisdiction to grant further relief as to the maintenance of the children. *McNees v. McNees*152

DOCKET—

An appeal to the circuit court in an equity case should be placed on the equity docket. *Mocquot v. Meadows*543

DOGS—

1. The owner of a dog is liable under the statute (Kentucky Statutes, sec. 68), for compensatory damages to any person who is bitten by the dog; and the jury may give punitive damages if the owner had knowledge of the fact, prior to the injury, that the dog was vicious toward persons. *Koestel v. Cunningham*421
2. The jury had enough evidence before them in this case to conclude that the defendant had knowledge prior to plaintiff's injury of the vicious nature of his dog, although there was no direct proof of such knowledge on his part. *Idem.*.....421

DOWER—

Where a testator devised to his two sons in trust for their children "equal interests" in a house and lot, upon the death of a child of one of the sons, one-half his share passed under the statute to his father and mother, and the father having since died, the mother is entitled in fee to one-half of the interest which thus passed to her and the father, and is entitled to dower in the other half. *Butler, &c., v. Butler, &c.*136

DYING DECLARATIONS—

1. Where it appears the deceased made a dying declaration which was reduced to writing and signed by him, parol testimony as to his statement is not competent in the absence of testimony to show that it is not within the power of the Commonwealth to produce the writing. But where the writing is produced and can not be admitted as evidence because the statement is irrelevant, or it is otherwise inadmissible, the court should admit parol testimony to prove the dying declaration. *Saylor v. Commonwealth* ..184
2. The writing is the best evidence, although not sworn to. It is sufficient if it is signed by the deceased. *Idem.*184
3. A statement is not admissible as a dying declaration unless it was made under a sense of impending death. And the statements of the deceased that "he would not get well," and that he "could not

Dying Declarations. Elections.

DYING DECLARATIONS—Continued.

stand it much longer" are not sufficient to show a conviction that death was impending, especially in view of the fact that he had lived nearly seven months after being shot. *Starr v. Commonwealth*193

4. Dying declarations should be restricted to the act of killing and the circumstances immediately attending it, and forming part of the *res gestae*.

The declaration of the deceased in this case that he did not know what made accused shoot him, that they had always been good friends, does not conform to that rule, and its admission was prejudicial. *Idem.*193

ELECTIONS—

As to eligibility to office—SEE OFFICERS, 5.

As to election of city councilmen—SEE TOWNS AND CITIES, 6, 9.

As to necessity for submission to vote of question as to creation of indebtedness by county—SEE CONSTITUTIONAL LAW, 16.

1. Where the law fixes the time for holding an election the notice otherwise required to be given may be dispensed with. *Board of Trustees of Augusta v. Maysville, &c. R. Co.*145
2. Section 152 of the constitution which provides for the filling of vacancies in "all elective offices," applies to offices for towns and cities as well as those for larger territories, and to offices created by the General Assembly as well as to those created by the constitution. And the provision of section 160 of the constitution, empowering the General Assembly to prescribe how vacancies in offices for towns and cities may be filled is to be construed in connection with section 152, and, therefore, can not be regarded as empowering the General Assembly to provide for the filling of such vacancies for a longer time than is provided by that section. *Shelley v. McCullough*164
3. A vacancy in a city office may be filled at the next succeeding election, as provided by section 152 of the constitution, although city officers are not then to be elected; though it may be that a vacancy in an office for a larger territory could not be filled at an election at which city officers only were to be elected. *Idem.*164
4. Section 148 of the constitution, which prohibits the simultaneous holding of city and congressional elections, does not prohibit the filling of a vacancy in a city office at the time of a congressional election. *Idem*164
5. A person who possesses the qualifications named in section 3511, Kentucky Statutes, is eligible to the office of police judge in a city of the fourth class, although he is not a qualified elector in

Elections.

ELECTIONS—Continued.

- the city. *Boyd v. Land*.....379
6. Section 3485 Kentucky Statutes, in so far as it provides that the "election" of councilmen and other elective officers of each city of the fourth class shall possess the qualifications of electors prescribed by sec. 145 of the constitution, was not intended to regulate the eligibility of officers, but of electors, it being manifest that the word "election" should be read "electors." *Idem*, 379
7. The provision of sec. 167 of the constitution that the terms of police judges "elected" in November, 1893, shall begin September 1, 1894, and continue until the November election, 1897, applies as well to a police judge appointed by the board of council of a city as to one elected by the qualified voters of the city. *Idem*, 379
8. Where a police judge was appointed by the board of councilmen in April, 1893, and again in November, 1893, his term of office, by virtue of his first appointment, did not expire until August 31, 1894, and his term of office by virtue of his second appointment did not begin until September 1, 1894; and having died August 3, 1894, there were two vacancies to be filled, one for the term expiring August 31, 1894, and the other for the term beginning September 1, 1894, and the board of councilmen, as they have done, had the power to appoint appellant to fill the vacancy for the short term and appellee to fill the vacancy for the long term. *Idem*379
9. Notwithstanding a declaration of the board of councilmen in electing appellant that his term would expire at a certain time his term would not then have expired if the constitution had fixed a longer term. *Idem*379
10. The provision of sec. 160 of the constitution that the term of elective officers of towns and cities other than members of legislative boards "shall be four years" was not intended to apply to officers that might be elected under the then existing charters of towns and cities, but was intended to control the General Assembly when it should come to provide by general laws for the government of towns and cities under the new constitution. *City of Lexington v. Wilson, &c.*.....707
11. As no general law for the government of cities of the second class had been passed by the General Assembly at the time of the general election in November, 1893, officers of such cities then elected were elected under the old charters, which, except as to the time of election of city officers, were continued in force by sec. 166 of the constitution until the General Assembly should provide by general laws for the government of towns and cities. *Idem*707

Elevators. Evidence.

ELEVATORS—

As to liability of operator of elevator for injury to passenger—**SEE CARRIERS, 4.**

EMBEZZLEMENT—

Where an agent or servant of a corporation converts to his own use money which he has collected for the corporation he is guilty of embezzlement, although he may have been entitled to a commission for collecting. The rule that where one follows collecting on commission as a business he is not guilty of embezzlement if he fails to pay over has no application. *Clark v. Commonwealth* 76

EQUITY—

1. Where an estate had been defeated by the breach of a condition subsequent in a deed the grantors were entitled to maintain an equitable action to have the effect of the deed declared, and to recover rents. *Griffith, &c. v. Owensboro, &c. R. Co.*.....139
2. An appeal to the circuit court in an equity case should be placed on the equity docket. *Mocquot v. Meadows*543
3. An action for the settlement of a partnership, whether a general or special one, is of exclusively equitable cognizance. *Idem*...543
4. In an equitable action the court erred in rejecting defendant's deposition, previously taken. *Idem*.....543

ESTATES—

Created by will—**SEE DEVISE.**

ESTOPPEL—

City estopped to recover back money paid under mistake—**SEE MISTAKE, 2.**

Estoppel to deny title of corporation—**SEE CORPORATIONS, 5.**

EVIDENCE—

As to burden—**SEE BURDEN OF PROOF.**

As to evidence in action for settlement of partnership—**SEE PARTNERSHIP.**

1. A stockholder in a corporation may testify in chief for the corporation after persons having no interest in the corporation have given testimony in chief in its behalf, as the word "person," as used in sub-sec. 4 of sec. 606 of the Civil Code, is to be regarded as synonymous with party to the action. *Western District Warehouse v. Hayes* 16
2. It was not competent to show the bad reputation of a witness in a

Evidence.

EVIDENCE—Continued.

- county in which he had not resided, and among people whom it did not appear were his neighbors. *Combs v. Commonwealth*..24
3. In a suit by the wife against the husband upon a note executed by him to her he was not a competent witness in support of the averments of his answer. *Leahy v. Leahy* 59
 4. In an action against a railroad company to recover for the death of a brakeman resulting from his coming in contact with an overhead bridge, the defendant was not prejudiced by the action of the court in admitting testimony to the effect that the bridge had been raised by defendant since the accident, it being shown by the testimony for defendant that the bridge was too low for a brakeman to pass under without stooping. *Cincinnati, &c., R. Co. v. Sampson's Adm'r* 65
 5. In such an action the defendant was not prejudiced by the testimony of the widow that she had one child, as this condition of the decedent's family was not made an element of damage in any instruction to the jury. *Idem.* 65
 6. When the accused goes upon the witness stand to testify for himself, he may be subjected to the same kind of cross-examination as any other witness and be impeached as any other witness, but he can not be compelled to give evidence against himself, except as to the charge under consideration, and, therefore, can not be required to admit the commission of other offenses which would subject him to punishment, presentment or infamy. *Saylor v. Commonwealth*184
 7. Upon the trial of appellant for the killing of one person he should not be compelled to testify as to who killed certain other persons not only because he can not be required to give evidence against himself, but because such testimony is not relevant. *Idem.* ..184
 8. Where it appears that the deceased made a dying declaration which was reduced to writing and signed by him, parol testimony as to his statement is not competent in the absence of testimony to show that it is not within the power of the Commonwealth to produce the writing. But where the writing is produced and can not be admitted as evidence because the statements are irrelevant, or it is otherwise inadmissible, the court should admit parol testimony to prove the dying declaration. *Idem.*184
 9. The writing is the best evidence, although not sworn to. It is sufficient if it is signed by the deceased. *Idem.*184
 10. Upon a trial for murder it was error to refuse to permit defendant to testify that at the time the shot was fired he believed he had no other means of escape. *Starr v. Commonwealth*193
 11. The indictment having been dismissed as to one of the defendants,

Evidence.

EVIDENCE—Continued.

- who, being introduced as witness for the Commonwealth, confessed his own guilt and implicated his co-defendant, who was being tried, it was not proper to permit the Commonwealth to show that this witness had, prior to the dismissal as to him, offered to plead guilty, this testimony being offered by the Commonwealth only after a long cross-examination of the witness, indicating that his good faith in the confession of his guilt and the implication of his co-defendant was questioned. *Breckinridge v. Commonwealth*267
12. It was not improper to refuse to permit the defendant to prove that the prosecuting witnesses had stated soon after the robbery and before the arrest of the defendants that the persons who committed the robbery were thoroughly masked at the time and that they did not recognize them, these witnesses having admitted that they had frequently made such statements, although they did not remember making the particular statements at the time and place laid. *Idem.*267
13. In an action against a railroad company to recover damages for the killing of a drunken passenger who had been put off the train, it was not competent for the plaintiff to prove that the conductor said when he heard that a man had been killed on the track that "he expected it was the man he put off the train;" this declaration not being a part of the *res gestae*. *L. & N. R. Co. v. Ellis' Adm'r*330
14. While the main issue in this case is as to the validity of the note sued on, under the plea of "*non est factum*," yet as all indebtedness of every kind is denied by the answer, and a full and final settlement between the parties is pleaded in the answer and put in issue by the reply, testimony tending to show an existing indebtedness to plaintiff from the defendant's testator, whose name was signed to the note, was properly admitted. *Kendall's Ex'or, v. Collier*446
15. While the testimony of plaintiff as to transactions with the decedent may not have been prejudicial because the facts to which he testified were established by the testimony of other witnesses, yet upon another trial the court should exclude such objectionable testimony. *Idem.*446
16. To enable one to testify as to the genuineness of the handwriting of another it is sufficient that he has seen him write. *Idem.*...446
17. A witness who expresses an opinion as to the genuineness of the handwriting of another, whether as an expert or from having seen the person write, should be allowed to give the reasons for his opinion. *Idem*446

Evidence. Executors and Administrators.

EVIDENCE—Continued.

18. It was error to permit a witness, in addition to his statement as to the genuineness of the signature in question based on his knowledge from having seen the decedent write, to testify that he had examined the note sued on several months before, with a view to having it discounted by a bank with which he was connected, that he had then compared this signature with the signature of decedent to other papers which he knew to be genuine, but which other papers he had now lost and was unable to produce, and that he had sent this note with these other papers to a bank expert for the purpose of having him compare the signature, and that after this investigation his bank had actually discounted the note. *Idem.*446
19. Two or more persons jointly indicted may testify for each other, although a conspiracy is charged in the indictment and proved. *Kidwell v. Commonwealth*538

EXCESSIVE VERDICT—

1. Verdict for \$1,000 for ejection of passenger from railroad train not excessive. *Chesapeake, &c. R. Co. v. Osborne.*112
2. Verdict for \$500.00 not excessive for injuries to small boy whereby his general health was impaired. *Ky. Hotel Co. v. Camp.*....424

EXCURSION TRAIN—

As to liability of railroad company for ejection of passenger from—*SEE RAILROADS, 11.*

EXECUTIONS—

As to return of "no property"—*SEE ASSIGNMENT; JUDGMENTS, 1.*

EXECUTORS AND ADMINISTRATORS—

1. Where a solvent debtor qualifies as administrator of the estate of his creditor the amount of the debt must be treated as cash assets coming to his hands for the proper disposition of which the sureties in his bond are liable. And the fact that one of several sureties in the bond is surety in the note by which the debt is evidenced does not make that surety liable for the entire debt as between him and the other sureties. *Johnson v. Hicks' Guardian*116
2. The statute giving a right of action against a railroad company to the administrator of one who has been killed by the negligence of the company implies the right to have an administrator appointed in this State for the sole purpose of prosecuting such action, although the decedent was a resident of another State and had no personal estate in Kentucky and had no debts due him

 Executors and Administrators. Final Orders.

EXECUTORS AND ADMINISTRATORS—Continued.

- here. And the court of the county where the injury was done and where the man died is the proper court to make the appointment. *Brown's Adm'r v. L. & N. R. Co.*.....228
3. As the question as to whether plaintiff was a lawfully appointed administrator was made by defendant on affidavits and by preliminary motion in the court below, and was decided in favor of plaintiff, it was no longer an open issue proper to be made again in the same case between the same parties, and plaintiff was right in not accepting such issue and in introducing no evidence on same on the final trial. *Idem.*228
4. Where no commissions had ever been allowed to one who acted as administrator of his son and guardian of his grandchildren, and the wards after many years sought to surcharge his settlements as administrator and guardian, it was proper to allow him, or his personal representative, to set-off his commissions against any items established against him as administrator or guardian. *Sherley v. Sherley, &c.*.....512

EXEMPTIONS—

As to exemption from taxation—SEE TAXATION, 1, 8.

1. Where a debtor residing in this State goes into another State for temporary purposes of business or pleasure, taking with him personal property which is exempt from execution or attachment under the laws of this State, but which is not exempt under the laws of the State into which it is taken, a creditor in this State has no right to follow him and subject the property, and if he does so the debtor is entitled to recover damages. *Stewart v. Thomson*575
2. The courts of this State have the power, and it is their duty, to enjoin citizens of the State within their jurisdiction from evading the laws of the State through the machinery of the law or courts of a foreign State. *Idem.*575
3. Exemption laws have no force beyond the territorial limits of the State enacting them, hence a citizen of one State when his property is levied on in another State can not plead with effect the exemption laws of his own State. *Idem.*575

EXPERT TESTIMONY—

As to handwriting—SEE EVIDENCE, 16, 17, 18.

FEME SOLE—SEE HUSBAND AND WIFE, 1.

FINAL ORDERS—

1. An appeal from a judgment merely confirming a previous judg-

Final Orders. Fraud.

FINAL ORDERS—Continued.

- ment, which was final, does not authorize the Court of Appeals to review the judgment thus confirmed, there being no appeal therefrom. *Finnell, &c., v. Higginbotham, Trustee*, 21
2. In a suit brought by a trustee for the construction of a will, a judgment directing him to do certain things in execution of the will was not a final judgment, and was not conclusive as to the validity of the will. *Morgan, &c., v. Halsey, Trustee*789

FISCAL COURT—

As to jurisdiction of—**SEE JURISDICTION, 2-4.**

FORCIBLE DETAINER—

As to right to new trial in forcible detainer proceeding—
SEE NEW TRIAL, 1.

FORECLOSURE—

Foreclosure proceedings can not be had under our practice. *Speagle v. Dwelling House Ins. Co.*648

FOREIGN LAWS—SEE CONFLICT OF LAWS.**FORMER JEOPARDY—**

1. A person is in legal jeopardy when he is put upon trial before a court of competent jurisdiction upon indictment or information which is sufficient in form and substance to sustain a conviction, and a jury has been charged with his deliverance; and a jury is said to be thus charged when it has been impaneled and sworn. *Gaskins v. Commonwealth*494
2. Where the same acts constitute two or more misdemeanors, any court having jurisdiction of any one of the misdemeanors may elect to try, and if it does so this trial will bar a prosecution for any other misdemeanor upon the same facts. But a prosecution for a misdemeanor in an inferior court having jurisdiction to try misdemeanors only will not bar a prosecution for a felony upon the same facts, as no one can be said to be in jeopardy on a charge for felony in a court that has no jurisdiction of felonies. *Reddy v. Commonwealth*784
3. A trial by collusion of the accused and the officers is of no validity and affords the accused no protection. *Idem.*784

FRAUD—

As to fraud in procurement of contract from guardian—**SEE GUARDIAN AND WARD, 3, 4.**

 Fraud. Guardian and Ward.

FRAUD—Continued.

As to fraud in procuring surrender of claim—**SEE INSURANCE, 3.**

As to liability of bank president for false statement as to condition of bank—**SEE BANKS, 12, 13, 14, 15.**

FRAUDULENT CONVEYANCES—

In this action brought by a creditor to set aside a conveyance from the debtor to his wife upon the ground it was intended to defraud creditors, the evidence fails to establish the defense that the land was paid for by his wife and conveyed to the husband by mistake, and that his conveyance to her was intended to correct that mistake. As the conveyance attacked recites that the husband is free from debt, and that the consideration is "love and affection," the testimony establishing the mistake as well as that showing the consideration to have been paid by the wife should at least be strong enough to overthrow the *prima facie* case made out by the deed itself. *Farmers' Bank of Kentucky v. Stapp*. .432

GIFTS—

An interest in personalty may be given by parol, or one may undertake by parol to stand seized to the use and benefit of another as to personal estate. And the rule that actual possession must accompany the gift is not of universal application.

In this case an interest in a mercantile firm is held to have passed by parol gift. *Sherley v. Sherley, &c.*512

GOLD—

A city may make its bonds payable in gold, although the act authorizing them to be issued is silent upon that subject. *Farson, Leach & Co. v. Board of Comm'sr's of Sinking Fund of City of Louisville*120

GRAND JURY—

As to failure of first grand jury to indict when examining court has held defendant over—**SEE INDICTMENT, 3.**

GUARDIAN AND WARD—

As to commissions of guardian—**SEE EXECUTORS AND ADMINISTRATORS, 4.**

1. Where one who is solvent qualifies as administrator of the estate of his creditor, or as the guardian of infants to whom he is indebted, the amount of the debt must be treated as cash assets coming to his hands for the proper disposition of which the sure-

Guardian and Ward.

GUARDIAN AND WARD—Continued.

- ties in his bond are liable. And the fact that one of several sureties in the bond is surety in the note by which the debt is evidenced, does not make that surety liable for the entire debt as between him and the other sureties. *Johnson v. Hicks' Guardian*116
2. A writing executed by a guardian agreeing to sell to another the dead and perishing timber on his wards' land passed no title until the timber was so marked that it could be readily identified. *Clark, &c., v. Layne, &c.*290
 3. Rights of parties under such a writing where valuable trees had been deadened without the knowledge of the guardian, but with the knowledge of the purchaser. *Idem.*290
 4. The guardian having been removed after refusing to deliver the trees which had been deadened without his knowledge, and another having been appointed in his stead who has placed the purchaser in possession of all the dead trees, the former guardian, in this action brought by him, is entitled to reasonable compensation for the labor and expense he incurred in preparing the timber for market after he refused to deliver it to the purchaser under the writing referred to, and the court should by proper orders protect the rights of the infants, as it would be a fraud upon their rights to enforce the writing against them, even if it was a contract. *Idem.*290
 5. Although the infants filed a written request that the court dismiss the action as to them, it was error to do so. *Idem*290
 6. Where in a suit involving the settlement of a guardian's accounts the guardian was credited by the amount of certain notes belonging to the wards in arriving at the amount for which judgment was rendered against him, and it was recited in the judgment that these notes "are not charged to the defendant in making up the judgment. The plaintiffs may hereafter make claim on account of said notes if they are not collected," that judgment is not a bar to this action by the wards against the guardian and his sureties to recover the amount of such of those notes as have not been collected. *Lyon, by, &c., v. Perrin's Adm'r*738
 7. If a guardian removes the property of his wards from the State without sanction of a court of chancery jurisdiction, in violation of sec. 18 of chap. 48 of the General Statutes, the sureties in his bond become liable on his failure to account therefor. And where a guardian accepts the notes of non-residents for any part of the estate of his ward it amounts to a removal of so much of the property of the ward from the State, and the guardian and his sureties are liable for the amount of the notes without regard to

Guardian and Ward. Husband and Wife.

GUARDIAN AND WARD—Continued.

whether they could have been collected. *Idem.*738

HANDWRITING—

Testimony as to—**SEE EVIDENCE, 16, 17, 18.**

HIGHWAYS—SEE ROADS.**HOMESTEAD—**

1. This court can not review the judgment of the lower court in so far as it denies to one of the appellants a homestead as against certain mortgages, the pleadings of the mortgagees not being before the court. *Finnell, &c., v. Higginbotham, Trustee* 21
2. The statute prescribes the particular mode in which a homestead right may be released or waived, and strict compliance with the statute is indispensable to such release or waiver.

A writing executed by a debtor and his wife transferring all their claim for homestead exemption under a deed of assignment executed by the debtor did not deprive them of the right to the fund set apart in lieu of the homestead, as the writing was never acknowledged or recorded as required by the statute in order to pass the homestead. *Tabler, &c., v. Sullivan* 79

HOMICIDE—

1. Proper instruction to the jury upon trial for murder where testimony tended to show that the dwelling of accused was attacked by deceased with the intention of having carnal knowledge of the wife of accused, or of carrying her away for that purpose. *Saylor v. Commonwealth*184
2. It was error to qualify an instruction as to self-defense by telling the jury, in effect, that they could not acquit on that ground if they believed that defendant "brought on the difficulty" and sought the life of deceased, or to do him great bodily harm, there being no testimony on which to base such an instruction—*Starr v. Commonwealth*194
3. Upon the trial of a constable for murder the court should have given instruction to the jury as to the right of an officer to carry arms for his protection while in the discharge of his duties. *Idem.*194
4. One indicted for murder may be convicted upon proof that he aided and abetted another. *Gaskins v. Commonwealth*494

HUSBAND AND WIFE—

As to conveyance by husband to wife in fraud of creditors—
SEE FRAUDULENT CONVEYANCES.

Husband and Wife. Indictment.

HUSBAND AND WIFE—Continued.

1. The wife, although empowered to trade as an unmarried woman, can not sue the husband upon a note which he has executed to her, unless she shows some equitable ground of relief. *Leahy v. Leahy* 59
2. Ordinarily where the wife holds the note of the husband executed for money which belongs to her as her separate estate, and which he has obtained from her, with or without her consent, the chancellor may enforce her equity and require a settlement on her of such an estate as she may be entitled to. *Idem.* 59
3. The allegation of the wife's petition that the note upon which she sues is her separate estate is a conclusion of law. *Idem.* 59
4. In a suit by the wife against the husband upon a note executed by him to her, the husband was not competent to testify against the wife in support of the averment of his answer. *Idem.* 59

IMBECILES—

1. To give the county court jurisdiction to take from a person his estate upon the ground that he is incompetent to manage it, the reason or cause of the infirmity as well as what estate is owned by the subject of the inquest must be made to appear by the verdict. The statute authorizing such a proceeding should be strictly construed and literally followed. *Menifee, Committee, v. Ends* 388
2. The provisions of sec. 2162, Kentucky Statutes, apply only to persons of "unsound mind," and appellee was not found either by the verdict of the jury or the judgment of the court to be a person of unsound mind. *Idem.* 388

IMPROVEMENTS—

Adjustment of rents and improvements where deed executed by trustee was set aside for failure of maker of trust to unite with trustee in the deed. *Halley, &c., v. Winchester Diamond Lodge* 438

INDEXERS—SEE OFFICERS, 6, 7.

INDICTMENT—

1. An indictment for robbery which charges that the property was feloniously taken from M against his will and by force and by presenting pistols and other weapons at him, and by putting him in fear of immediate injury to his person, the property being at the time in his possession, is sufficient, although it does not expressly charge that the property was taken from the person of M, it being impossible to draw any other conclusion from

Indictment.

INDICTMENT—Continued.

- the language used than that it was so taken. *Breckinridge v. Commonwealth*267
2. Where an indictment for uttering a forged warehouse receipt charged that the forged writing certified that the whisky for which it was issued was in a certain bonded warehouse, in the "fifth" district of Kentucky, the fact that it appeared upon the trial that the warehouse described in the receipt was in fact in the eighth district of Kentucky did not amount to a variance between the indictment and proof. *Sutton v. Commonwealth*308
 3. Where an examining court has held the defendant to answer the charge before the grand jury, the failure of the first grand jury to indict should be treated as a direct refusal to indict, and a subsequent grand jury can not indict unless the charge is submitted to them by direction of the court. But if an indictment is subsequently found without the charge having been again submitted to the grand jury by direction of the court, the defendant waives the right to have it dismissed upon that ground, if he pleads to it without making a motion to dismiss. *Idem.*308
 4. A dismissal as to one of the defendants did not *ipso facto* operate as a dismissal as to the other. *Idem.*308
 5. A motion to set aside the indictment upon the ground the names of the witnesses were not indorsed as required by sec. 120 of the Criminal Code, should have prevailed if it had been made in proper time, but, as it was not made until after defendant had pleaded and gone into one trial, it came too late. *Idem.*308
 6. The provision of sec. 178 of the Criminal Code that the dismissal of an indictment "for variance between the indictment and proof" shall not bar another prosecution for the same offense, does not apply where there was no dismissal of the indictment until after a trial and verdict, there being then no pending indictment to be dismissed. Therefore, appellant's plea of former acquittal in this case should have been sustained, although the former acquittal may have been due to a variance between the indictment and proof, there having been a verdict of not guilty in obedience to a peremptory instruction. *Gaskins v. Commonwealth*494
 7. Although appellant was proved on the first trial not to have himself done the killing, but aided and abetted another, he might have been legally convicted of the crime of murder for which he was indicted, and there was, therefore, in the meaning of the Code, no variance between the indictment and proof. *Idem.*...494
 8. The offense of keeping a disorderly house consists of a repetition of improper conduct, and to constitute a good indictment for that

 Indictment. Injunctions.

INDICTMENT—Continued.

offense words must be used which show the repetition or frequency of the acts complained of, as that the acts were done on a day certain "and on divers other days and times," etc. It is not sufficient to allege that the acts were done "on the — days of —, 1894, and before the finding of the indictment." *Idem*..494

9. An indictment charging the defendant with the offense of "passing counterfeit money, knowing the same to be counterfeit, with the intention of circulating the same," alleged to have been committed by defendant by having in his possession and "passing a \$10 gold coin, knowing the same to be forged and counterfeit and with the intention of circulating the same," is fatally defective in failing to aver that such coin was in circulation, and also in failing to give any sufficient description of the coin so alleged to have been passed, the offense intended to be charged being that denounced by sec. 1181, Kentucky Statutes, and not that denounced by sec. 1190 Kentucky Statutes. *Waller v. Commonwealth*509

INFANTS—

As to sales of real estate of—SEE JUDICIAL SALES, 1, 2.

As to jurisdiction to determine custody of—SEE JURISDICTION, 1.

As to saving of limitation law in favor of—SEE LIMITATION, 3.

INJUNCTIONS—

As to right to enjoin trespass—SEE TRESPASS, 1.

As to right to enjoin collection of taxes—SEE TAXATION, 6, 7.

1. Officers or agents controlling property of the State, such as an insane asylum, may be enjoined from so using it as to create a nuisance. *Herr, &c., v. Central Kentucky Lunatic Asylum* ..458
2. The courts of this State have the power, and it is their duty, to enjoin citizens of the State within their jurisdiction from evading the law of the State through the machinery of the law or courts of a foreign State. *Stewart v. Thompson*575
3. The State may, by injunction, prevent a railroad company from consummating the purchase of a parallel or competing line in violation of sec. 201 of the State Constitution. *L. & N. R. Co. v. Commonwealth*675
4. While the fact that the grounds as set forth in the petition are insufficient to justify the injunction should properly have been taken advantage of by a motion to dissolve the injunction, still it was a proper matter to be considered by the court in finally dis-

Injunctions. Insurance.

INJUNCTIONS—Continued.

- posing of the case. *Payton v. McQuown*, Adm'r757
5. The negligence or improper conduct of an attorney employed to defend a suit at law, or his failure or neglect to defend the action, will not justify an injunction against the judgment. *Idem*...757
6. The power conferred by sec. 273 of the Civil Code of Practice upon the clerk of the circuit court to grant an injunction is judicial in its nature, and can not, therefore, be exercised by a deputy. *Idem*.757

IN PARI DELICTO—

Where passengers on the cars of one railroad company are injured by a collision with the cars of another company at a crossing of the two roads, if both companies were actual participants in the wrong, they will be regarded as *in pari delicto* without regard to the relative degrees of their neglect, and one of them having been compelled to respond in damages can not have contribution from the other. *Cincinnati, &c., R. Co. v. L. & N. R. Co.*,128

INSOLVENTS—

As to preference of creditors—SEE ASSIGNMENTS BY OPERATION OF LAW.

INSTRUCTIONS TO JURY—

1. Proper instruction to jury upon trial for murder where testimony tended to show that the dwelling of accused was attacked by deceased with the intention of having carnal knowledge of the wife of accused or of carrying her away for that purpose. *Saylor v. Commonwealth*184
2. Qualification of instruction as to self-defense not authorized by the evidence. *Starr v. Commonwealth*194
3. Upon the trial of a constable for murder the court should have given an instruction to the jury as to the right of an officer to carry arms for his protection while in the discharge of his duties. *Starr v. Commonwealth*194
4. Proper instructions as to negligence and contributory negligence in action to recover for injuries to infant passenger in an elevator. *Kentucky Hotel Co. v. Camp*424

INSURANCE—

As to duty of warehousemen to insure tobacco on storage—
SEE CUSTOM.

1. Where a policy of fire insurance provided that it should be void if any change should take place "in the interest, title or posses-

Insurance. Inter-State Commerce.

INSURANCE—Continued.

- sion" of the property, "whether by legal process or judgment or by voluntary act of the insured or otherwise," a sale of the property under a judgment enforcing a mortgage lien and a conveyance to the mortgagee, who became the purchaser, constituted such a change in the title as rendered the policy void, although the mortgage was made with the consent of the company, and an indorsement was made by the company upon the policy that the loss, if any, was payable to the mortgagee, "as his interest may appear." The indorsement upon the policy gives the mortgagee no right to recover, as his interest as mortgagee has been merged in his perfect legal title, and he can have no greater right than the insured, as to whom the change of title renders the policy void. *McKinney, &c., v. Western Assurance Co. of Toronto.* .474
2. The fact that the mortgagee purchased under an agreement to allow the wife of the insured to redeem did not continue the policy in force for her benefit, she being a stranger to the contract of insurance. *Idem.*474
 3. Where the holder of an insurance policy in ignorance of his legal rights, and not as a compromise of a doubtful claim, has been induced by the fraudulent misrepresentations of the company's agents to accept in satisfaction of his loss under the policy a smaller amount than was due him, a court of equity will, at his instance, rescind the contract by which he surrendered a part of his claim. *Titus v. Rochester German Ins. Co.*567
 4. The fact that two of several insured houses were vacant when destroyed by fire does not impair the right of plaintiff to recover on account of the other houses so destroyed, which were embraced in the same policy, each house being insured for a specific amount. *Speagle v. Dwelling House Ins. Co.*646
 5. As the policy recited that the insured houses were then under way of construction and privilege was given the insured to complete them, a provision in the policy that it should be void if the property should be "incumbered by mortgage or otherwise," or "if foreclosure proceedings shall be commenced," could not have been intended to apply to the creation or enforcement of the statutory lien of a lumberman and builders, and the fact that the lumberman and builders have taken the necessary steps to perfect the lien given them by the statute does not affect the right of the insured to recover on the policy. *Idem.*646

INTER-STATE COMMERCE—

Sec. 201 of the constitution, which provides that no railroad company shall acquire by purchase "any parallel or competing

Inter-State Commerce, Judges.

INTER-STATE COMMERCE—Continued.

line or structure, or operate the same," is not a regulation of inter-state commerce, nor does its enforcement infringe upon the power of congress to regulate commerce between the States. *L. & N. R. Co. v. Commonwealth*675

JEFFERSON CIRCUIT COURT—

As to election of special judge in—SEE JUDGES, 2.

As to transfer of suits from one branch to another—SEE TRANSFER OF SUITS.

JOINT WRONG-DOERS—

As to contribution between—SEE RAILROADS, 13, 14.

JUDGES—

As to qualification of police judges—SEE ELECTIONS, 5-9.

As to terms of police judges—SEE ELECTIONS, 5-9; POLICE JUDGES.

1. To make one eligible as special judge in a particular case it is not necessary that he should be a resident of the district in which the case is pending. *Breckinridge v. Commonwealth*267
2. There are only two conditions in which the statute authorizes election of a special judge in either of the three branches of the Jefferson Circuit Court having jurisdiction of civil cases. The first is where a case has been once transferred, and the presiding judge of the branch to which the transfer is made can not sit. The other is where from any cause the presiding judge fails to attend; but not even in that case can there be a special judge if the judge of any branch attends and holds the court for the occasion. *Hindman, &c. v. Toney*413
3. An order made by a special judge of the chancery branch of the Jefferson Circuit Court transferring to the common pleas branch an action in which he could not sit, while irregular, was not void. But whether void or not the question was entirely within province of the judge of the common pleas branch, and it was for him alone to decide how the case should be disposed of. *Idem*....413
4. A special judge of one of the divisions of the Jefferson Circuit Court has no power to take part in the election of an indexer required to be elected by the judges of the circuit and county courts, as he has no power except to hold court for the occasion. *Roberts v. Cain*722
5. The statute creating the office of indexer of public records and authorizing the judges to appoint is not unconstitutional. *Roberts v. Cain*722

Judgments. Judicial Sales.

JUDGMENTS—

As to weight given judgment of chancellor on appeal—**SEE APPEALS, 4.**

1. The remedy provided by sec. 439 of the Civil Code and the following sections for enforcing the satisfaction of judgments where there has been a failure to collect by execution must be strictly pursued.

The return of "no property" upon an execution not directed either to the county in which the judgment was rendered, or to the county of the residence of the defendant against whom the judgment is sought to be enforced, will not enable the plaintiff to maintain such an action. *Proctor v. Bell's Adm'r.* 98

2. The right to maintain an action for the enforcement of a judgment is barred by limitation where fifteen years have elapsed after the issual of one execution before the issual of another. And the fact that proceedings upon a judgment have been suspended by injunction as to some of the defendants does not prevent limitation from running in favor of a defendant as to whom there was no injunction, although he may have been a nominal party to the proceeding. *Idem* 98
3. The neglect of defendant's attorney to defend the action will not justify an injunction against the judgment. *Payton v. McQuown, Adm'r* 757
4. In a suit brought by a trustee for the construction of a will a judgment directing him to do certain things in execution of the provisions of the will was not conclusive as to the validity of the will. *Morgan, &c. v. Halsey, Trustee* 789
5. Although a judgment against one of several persons united in interest was binding on him it was not binding on the others who were not before the court, and a subsequent judgment in their favor inured to his benefit. *Morgan, &c. v. Halsey, Trustee.* 789

JUDICIAL ACTS—

The power conferred upon the clerk of the circuit court to grant an injunction is judicial in its nature, and can not therefore be exercised by his deputy. *Payton v. McQuown, Adm'r.* 757

JUDICIAL SALES—

As to creation of trust by purchase for another's benefit—**SEE TAX SALES.**

1. In proceedings under section 491, the bond provided for by section 493, of the Civil Code, is no longer required where the court by its commissioner retains the custody and control of the fund arising from the sale, and orders the money to be paid by the commissioner directly to the person from whom the purchase for

Judicial Sales. Jurisdiction.

JUDICIAL SALES—Continued.

- reinvestment is made, the bond being dispensed with in such cases by amendment to the Code of May 9, 1892, which was before the institution of this action. *Luttrell v. Wells, &c.*..... 84
2. A perfect title may be passed in such a proceeding, although the remainder be contingent, provided the person in being in whom the remainder would have vested if the contingency had happened before the commencement of the action be properly before the court. *Idem* 84
 3. By express provision of sec. 696 of the Civil Code, every sale made under an order of court must be public and upon reasonable credits, to be fixed by the court. Therefore, the court in this case had no power to authorize its commissioner to make a private sale or to sell for cash, and an exception to the report of sale upon the ground the sale was private should have been sustained. *Idem*, 84
 4. Although the court by its judgment authorized the sale to be made either for cash or on certain specified credits, which were within those prescribed by law, and the sale was in fact made on credit, yet as the commissioner sold upon longer credits than was authorized by the judgment, this might have been a valid ground of exception for the purchaser if he had chosen to avail himself of it. *Idem* 84
 5. A purchase of a right of way under a judgment of the chancellor gave to the purchaser no better title than was had by the original lessees whose interest he purchased. *McCloskey, Bishop, v. Doherty, &c.* 300
 6. As against defendants constructively served the court should have required proof that the land sought to be sold could not be divided without materially impairing its value. But as the court had jurisdiction and the land has been sold the purchaser can not be disturbed. *Perkins, &c. v. McCarley, &c.* 43

JURISDICTION—SEE VENUE.

As to appellate jurisdiction—SEE APPEALS, 3.

As to court having jurisdiction to appoint administrator—
SEE EXECUTORS AND ADMINISTRATORS, 2.

As to jurisdiction of county court to appoint committee for imbecile—SEE IMBECILES.

As to jurisdiction of Court of Appeals to grant original writs—
SEE COURT OF APPEALS.

1. The court which has rendered judgment granting a divorce and providing for the care and custody of the infant children of the marriage, alone has jurisdiction to grant further relief as to the maintenance of the children. *McNees v. McNees* 152

Jurisdiction. Jury.

JURISDICTION—Continued.

2. The jurisdiction of a penal action in the name of the Commonwealth against a corporation to recover the penalty prescribed for doing business in this State without complying with the provisions of sec. 571 of the Kentucky statutes, is in the circuit court of the county in which the offense is committed. Therefore, the Franklin Circuit Court has no jurisdiction of such an action, unless the offense was committed in Franklin county. *Commonwealth v. Grand Central B. & L. Asso.*325
3. A penal action of this kind the jurisdiction of which is not in the Franklin Circuit Court must be brought by the Commonwealth's Attorney for the district in which it is instituted. But the fact that this action was brought by the attorney-general would not affect the jurisdiction or invalidate the petition if it had been brought in the proper court. *Idem*325
4. Sec. 976 of the Kentucky statutes which makes the Franklin Circuit Court the fiscal court of the Commonwealth does not confer any jurisdiction on that court to try prosecutions for violations of the criminal or penal code of the State. Such having been the uniform construction and practice for more than forty years under a former statute of which this provision is almost a literal copy, the legislature must be presumed not to have contemplated any change. *Idem*325
5. The police court of a town of the sixth class, having jurisdiction concurrent with justices' courts in criminal and penal prosecutions, had no jurisdiction of a prosecution under sec. 1972 of the Kentucky Statutes against the owner of a pool table for the offense of permitting a minor to play pool on his table for compensation without the written permission of the parent of the minor, as the punishment of the offense is not "limited to a fine not exceeding \$100 or imprisonment not exceeding fifty days or both," but includes in addition to a fine of \$100 a forfeiture of "the right and privilege of again keeping such table," which is to be regarded as a part of the punishment in determining the question of jurisdiction. *Klyman v. Commonwealth*484
6. As the police court had no jurisdiction the circuit court should, upon appeal by the defendant, have dismissed the prosecution. *Idem*484

JURY—

1. Although one of the jury may have been incompetent because not at the time twenty-one years of age, that fact, as expressly provided by sec. 2253, Ky. Stats., is not cause for setting the verdict

Jury. Kentucky Statutes.

JURY—Continued.

- aside; nor could exception have been taken therefor after the jury was sworn. *Combs v. Commonwealth* 24
2. Tax-payers and residents of the city were not disqualified, by reason of their interest, to act as jurors, their interest being necessarily remote, uncertain and insignificant. *Ky. Wagon M'tg Co. v. City of Louisville* 548

KEEPING DISORDERLY HOUSE—SEE DISORDERLY HOUSE.**KENTUCKY STATUTES—**

1. The book entitled "The Kentucky Statutes" is not a revision of the laws of the Commonwealth but merely a collection of them and each act speaks for itself with respect to its effect on prior acts.
O'Mahoney v. Bullock, &c. 774
2. Provisions cited, construed, etc.
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Kentucky Statutes. License.

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LAND PATENTS—SEE PATENTS.**LANDLORD AND TENANT—**

As to right of action for trespass—SEE TRESPASS, 2.

LAWS—SEE CONFLICT OF LAWS.**LICENSE—**

Mere acquiescence on the part of a railroad company in the use of its

License. Limitation.

LICENSE—Continued.

tracks by the public as a passway does not amount to a license to so use them. *Brown's Adm'r v. L. & N. R. Co* 228

LICENSE TAX—SEE TAXATION, 3-6.**LIENS—**

Where a purchaser of land was by a judgment of court made a trustee for the investment of the purchase money for the benefit of others, the beneficiaries had an equitable lien upon the land to secure the investment. *Finnell, &c. v. Higginbotham, Trustee, &c.* 21

LIFE ESTATES—

As to devise of life estate with power of disposition—SEE DEVISE, 1.

1. Devise forbidding sale of land during life of life tenant was not intended to forbid sale for re-investment as provided by sec. 491 of Civil Code. *Luttrell v. Wells, &c.* 84
2. Under a particular will the daughters of the testator did not take merely a life estate, remainder to their children, but each took a fee-simple estate, to be joint with her children, if she had any, otherwise to be absolute. *Blankenbaker v. Woodruff, etc.* .. 276
3. Under a devise by a testator to his wife of one-third of the "net proceeds" of a tract of land, she took merely one-third of the net profits for life, and had no interest which she could devise. *Idem.* 276

LIMITATION—

1. The right to maintain an action for the enforcement of a judgment is barred by limitation where fifteen years have elapsed after the issual of one execution before the issual of another. And the fact that proceedings upon a judgment have been suspended by injunction as to some of the defendants does not prevent limitation from running in favor of a defendant as to whom there was no injunction, although he may have been a nominal party to the injunction proceeding. *Proctor v. Bell's Adm'r* 98
2. Where land of infant heirs sold for taxes was purchased by their uncle for their benefit, it being publicly so announced, an enforceable trust was created in their favor, and the plea of limitation is not available against an action by them to have the land reconveyed to them and to recover rent. *Vanbever v. Vanbever* 344
3. A local or special law fixing six months as the period of limitation as to actions for damages against a particular city had the effect, as to such actions against the city, to repeal the provision

Limitation. Married Women.

LIMITATION—Continued.

- of the general law fixing twelve months as the period of limitation, but did not operate to repeal the saving of the general law in favor of infants by which limitation as to them runs only from the time of the removal of their disability. *City of Louisville v. Garr, by, &c.*583
4. Where land was conveyed in discharge of a debt any usury embraced in the debt was then paid and the right to recover the usury is barred by limitation, more than one year having elapsed. *Tygret, &c., v Potter & Co.*54

LIQUOR SELLING—SEE LOCAL OPTION.

LIVERY OF SEIZIN—

The common law as to livery of seizin does not prevail in this State; and therefore no necessity exists for a re-entry in order to avoid an estate which has been defeated by the breach of a condition subsequent in a deed. *Griffith, &c. v. Owensboro, &c. R. Co.* 139

LOCAL OPTION—

- The exclusive power conferred by the charter of towns of the sixth class upon the trustees of such towns to regulate the sale of liquor therein, authorizes the trustees to license the sale of liquor only when the same can be done without violating existing law; and the provision of the charter conferring that power upon the trustees did not have the effect to repeal the general local option law as to such towns. Therefore, a vote subsequently taken under that law in a magisterial district embracing a town of the sixth class having resulted against the sale of liquor, the trustees of the town had no power while that law was in force to license the sale of liquor therein. *Cooper, County Clerk, v. Shelton.* 282
2. Neither general nor local prohibitory liquor laws in force at the time of the adoption of the constitution were repealed by that instrument. *Brann v. Hart, &c.*735
3. Title of particular local option law sufficient. *Idem.*.....735

LUNATIC ASYLUM—

As to right of action against—SEE STATE.

LUNATICS—SEE IMBECILES.

MANDAMUS—

Court of appeals has power to grant writ of mandamus to control inferior jurisdictions, but writ denied in particular case. *Hindman, &c. v. Toney*413

MARRIED WOMEN—SEE HUSBAND AND WIFE.

 Mechanics' Lien. Municipal Corporations.

MECHANICS' LIEN—

Insurance policy not rendered void by creation of—**SEE INSURANCE, 5.**

MISTAKE—

As to surrender of part of claim in ignorance of legal rights—
SEE INSURANCE, 3.

As to mistake in statute—**SEE ELECTIONS, 6.**

1. Mistakes in the execution of negotiable paper may always be corrected unless the rights of third parties have intervened. *German National Bank v. Butchers' Hide and Tallow Co.*..... 34
2. Where a city paid to one who had contracted to keep the public pumps in repair a greater sum than he was entitled to receive, the excess being paid under a mistake as to the number of pumps, this mistake being due to a false report by the contractor, the city is entitled to recover back the excess thus paid, unless the contractor entered into the contract fixing a low price per pump upon the faith of information furnished him by the authorized agent of the city that there was the number of pumps he afterwards reported, and in that event the city is estopped to recover back any part of the sums paid under the original contract. *City of Louisville v. Harlan* 286
3. In this action brought by a creditor to set aside a conveyance from the debtor to his wife upon the ground it was intended to defraud creditors, the evidence fails to establish the defense that the land was paid for by the wife and conveyed to the husband by mistake, and that his conveyance to her was intended to correct that mistake. As the conveyance attacked recites that the husband is free from debt, and that the consideration is "love and affection," the testimony establishing the mistake as well as that showing the consideration to have been paid by the wife should at least be strong enough to overthrow the *prima facie* case made out by the deed itself. *Farmers' Bank of Ky. v. Stapp*..... 432

MORTGAGES—

As to absolute conveyance to mortgagee with privilege of redeeming—**SEE CONDITIONAL SALES.**

Foreclosure proceedings can not be had under our practice. *Speagle v. Dwelling House Ins. Co.* 646

MARRIED WOMEN—SEE HUSBAND AND WIFE.**MUNICIPAL BONDS—SEE TOWNS AND CITIES, 1-5.****MUNICIPAL CORPORATIONS—SEE TOWNS AND CITIES.**

Negligence. New Trial.

NEGLECT—

As to duty of railroad company to trespassers on track—SEE
/ RAILROADS, 6, 7, 8, 23.

As to contribution between joint wrong-doers—SEE RAIL-
ROADS, 13, 14.

As to duty of railroad company to passengers—SEE RAIL-
ROADS, 11, 15, 24.

As to negligence of bank in failing to make collections—SEE
BANKS, 4-9.

1. A railroad company is guilty of wilful neglect in having an over-
head bridge on its road under which brakemen on the top of
freight trains can not pass without the exercise of more than or-
dinary care. *Cincinnati, &c., R. Co. v. Sampson's Adm'r*65
2. In an action against a railroad company to recover for the death of
a brakeman resulting from his coming in contact with an over-
head bridge, the defendant was not prejudiced by the action of
the court in admitting testimony to the effect that the bridge had
been raised by defendant since the accident, it being shown by
the testimony for *defendant* that the bridge was too low for a
brakeman to pass under without stooping. *Idem.*65
3. In such an action the court properly refused an instruction as to
contributory negligence. *Idem.*65
4. Proper instructions as to negligence and contributory negligence
in action against a hotel company to recover damages for injury
to plaintiff, a small boy, while a passenger in defendant's ele-
vator. *Kentucky Hotel Co. v. Camp*424
5. In such an action the lower court properly set aside a verdict for
defendant, because of error of the court in failing to define the
degree of care, skill and diligence necessary to be used in operat-
ing an elevator. *Idem.*424
6. City liable for injuries caused by collision of vehicles resulting
from defective construction of bridge. *City of Louisville v. Garr,*
by, &c.583
7. A judgment for defendant in an action against a railroad com-
pany to recover damages for personal injuries alleged to have re-
sulted from defendant's negligence is a bar to a subsequent
action against the same defendant to recover damages for the
same injuries, although the specific acts of negligence alleged in
the two petitions are different, there being but a single transac-
tion. *McCain v. L. & N. R. Co.*804

NEGOTIABLE INSTRUMENTS—SEE BILLS AND NOTES.

NEW TRIAL—

Properly granted for error in instructions—SEE CARRIERS, 5.

New Trial. Nuisance.

NEW TRIAL—Continued.

1. Where the right to recover in a forcible detainer proceeding was based upon the ground that one of the defendants, to whom plaintiff had leased the premises, had, without authority, sub-let them to his co-defendant, and it was not claimed upon the trial in the justice's court that plaintiff corporation or any of its officers had consented to the sub-letting, the fact that upon the trial of the traverse in the circuit court the original lessee testified that plaintiff's president was notified by him of his purpose to sub-let the premises and assented thereto, was such a surprise as entitled plaintiff to a new trial upon that ground, plaintiff having upon the introduction of the unexpected testimony moved for a continuance upon the ground that it was taken by surprise and that its president was then absent from the State. *L. & N. R. Co. v. Bickel*222
2. The neglect of defendant's attorney to defend the action will not justify an injunction against the judgment. *Payton v. McQuown, Adm'r*757

NON EST FACTUM—

As to competency of evidence under plea of—SEE EVIDENCE, 14.

NON-RESIDENTS—

As to proof of allegations against defendants constructively served—SEE CONSTRUCTIVE SERVICE OF PROCESS.

As to sufficiency of affidavit for warning order. SEE WARNING ORDER.

As to necessity for return of "no property" against foreign corporation—SEE ASSIGNMENT.

NOTARY PUBLIC—

The fact that a notary is cashier of and a stockholder in a bank does not prevent him from protesting a note held by the bank. *Moreland's Ass'ee v. Citizens' Savings Bank*211

NOTICE—

As to constructive knowledge on part of president and directors of banks.—SEE BANKS, 13.

Where the law fixes the time for holding an election the notice otherwise required to be given may be dispensed with. *Board of Trustees of Augusta v. Maysville, &c., R. Co.*145

NUISANCE—

1. A public nuisance is not the subject of a suit by a private individ-

 Nuisance. Officers.

NUISANCE—Continued.

- ual, unless he has sustained some special injury thereby. Therefore, the unreasonable obstruction of a highway by a railroad train, being a public nuisance, does not give a right of action to a traveler on the highway who has been delayed by the obstruction, unless accompanied by some special damage. *Shields v. L. & N. R. Co.*103
2. Officers or agents controlling property of the State, such as an insane asylum, may be enjoined from so using such property as to create a nuisance whereby the health or property of others will be injured. *Herr, &c., v. Central Kentucky Lunatic Asylum* .458
 3. Keeping a disorderly house is not an indictable offense, unless it be laid as a common nuisance. *Commonwealth v. Bessler* ...498

NULLA BONA—

As to return of—SEE ASSIGNMENT; JUDGMENTS, 1.

OBSTRUCTION OF HIGHWAY—SEE ROADS.

OFFICERS—

As to time of election of officers of towns and cities—SEE ELECTIONS, 10, 11.

As to qualifications and terms of police judges—SEE ELECTIONS, 5-9; POLICE JUDGES.

1. Upon the trial of a constable for murder the court should have given an instruction to the jury as to the right of an officer to carry arms for his protection while in the discharge of his duties. *Starr v. Commonwealth*194
2. In an action to recover an office the plaintiff must recover upon the strength of his own title and not upon the weakness of defendant's title. *Brown, &c. v. Holland, &c.*249
3. A tax collector is not a "district officer" within the meaning of section 234 of the constitution. *Commonwealth v. Blackwell*...314
4. Officers or agents holding and controlling property of the State, such as an insane asylum, may be enjoined from so using such property as to create a nuisance whereby the health or property of others will be injured. *Herr, &c. v. Central Ky. Lunatic Asylum*458
5. Where the constitution provides that no person shall be "eligible" to a particular "office" unless he possesses certain qualifications, it is sufficient that a person elected to the office possesses the required qualifications at the time fixed for taking the office, unless it is expressly provided that he shall possess them at the time of the election. Therefore, when a person elected to the office of clerk of a court has at the time fixed for taking the office the cer-

Officers. Partnership.

OFFICERS—Continued.

- tificate of qualification prescribed by sec. 100 of the constitution he is entitled to hold the office although he did not have the certificate at the time of the election. *Kirkpatrick v. Brownfield*558
6. A special judge of one of the divisions of the Jefferson Circuit Court can not participate in the election of an indexer required to be elected by the judges of the circuit and county courts, as he has no power except to hold court for the occasion. *Roberts v. Cain*722
7. The act creating the office of indexer and authorizing the judges to appoint is not unconstitutional, but is expressly authorized by sec. 107 of the constitution. *Idem*722
8. Under statute limiting salary of officers in counties having a population of over forty thousand, the recitals of a statute as to the population of a particular county are not evidence that it has the population recited. *Commonwealth v. Chinn, &c.*730

OPINION EVIDENCE—

As to hand-writing—SEE EVIDENCE, 16, 17, 18.

PARENT AND CHILD—

As to jurisdiction to determine custody of children—SEE JURISDICTION, 1.

PARI DELICTO—SEE IN PARI DELICTO.

PAROL GIFTS—SEE GIFTS.

PAROL TRUSTS—SEE TRUSTS, 5.

PARTIES TO ACTIONS—

As to necessary parties to action for sale of contingent remainder—SEE JUDICIAL SALES, 2.

As to right of action for trespass as between landlord and tenant—SEE TRESPASS, 2.

In a suit to have a transfer made by an insolvent debtor to a creditor declared to operate as an assignment under the statute the person receiving the benefit of the transfer should be made a party *Bowers, Ass'n, &c. v. The Huntington Bank*294

PARTNERSHIP—

1. In an action for the settlement of a partnership between plaintiff and defendant in the buying and shipping of cotton the court should have permitted defendant to prove by plaintiff, that he, plaintiff, was the owner of a store and paid for much of the cotton in goods out of his store, realizing a large profit thereon.

 Partnership. Per Stirpes Distribution.

PARTNERSHIP—Continued.

- Mocquot v. Meadows*543
 2, An action for the settlement of a partnership, whether a general or a special one, is of exclusively equitable cognizance. *Idem*..543

PASSING COUNTERFEIT MONEY—

As to indictment for—SEE INDICTMENT, 9.

PATENTS—

While by compact between the States of Kentucky and Tennessee fixing the boundary line between them the State of Kentucky was to have title to and right to dispose of all the vacant land within a certain territory in the State of Tennessee, and the legislature of Kentucky gave to some of the counties lying on the southern border vacant land situated within the territory mentioned, and authorized patents to issue on orders of county court of such counties, yet no such gift was ever made to the county of Bell, and the county court of that county, having no authority to make orders for location, survey or appropriation of the lands in controversy in this case which lie in the State of Tennessee, patents based upon orders of the county court of Bell county for such lands are void. *American Association (Limited), v. Short* 502

PAYMENT—

Except by agreement or usage a bank has no right to take anything but money in payment of paper it holds for collection. But the usage of a bank to accept checks in payment is binding upon a customer. *Farmers Bank & Trust Co. of Stanford v. Newland*464

PENAL ACTIONS—

As to jurisdiction of—SEE JURISDICTION, 2-4.

Section 572 of the Kentucky Statutes, even if valid, does not authorize an action by the Commonwealth to recover a penalty of a foreign corporation doing business in violation of its provisions. The remedy intended to be provided was by indictment and fine, and not by an action by the Commonwealth. *Commonwealth v. Jellico Coal Co.*246

PERSONAL REPRESENTATIVES—SEE EXECUTORS AND ADMINISTRATORS.

PERSONS OF UNSOUND MIND.—SEE IMBECILES.

PER STIRPES DISTRIBUTION—SEE DEVISE, 3, 4.

Pleading. Possession.

PLEADING—SEE COUNTER-CLAIM AND SET-OFF.

Answer properly made a cross-petition in particular case.—
SEE CROSS-PETITION.

As to submission by plaintiff under mistaken belief that no
answer had been filed—SEE PRACTICE IN CIVIL CASES, 7.

1. In a suit for the distribution of an estate under the statute against preferences by insolvent debtors, a claimant who had an equitable lien to secure his claim was entitled to have the lien enforced under his prayer for general relief, although the only specific relief asked was that it be allowed as a preferred claim. *Finnell, &c., v. Higginbotham, Trustee*21
2. In a suit by the wife against the husband upon a note executed by him to her the allegation of the petition that the note is plaintiff's separate estate is but a conclusion of law. *Leahy v. Leahy*59
3. Opinion upon appeal holding answer pleading alteration in negotiable note sued on to be good, although it did not allege that plaintiff had notice of the infirmity in the paper, did not preclude plaintiff bank upon the return of the case from filing reply alleging that it had no notice of the alteration. *Cason v. Grant County Deposit Bank*487

POLICE JUDGES—

As to election and terms of—SEE ELECTIONS, 5-9.

1. A person who possesses the qualifications named in sec. 3511, Kentucky Statutes, is eligible to the office of police judge in a city of the fourth-class, although he is not a qualified elector in the city. *Boyd v. Land*379
2. Under sec. 167 of the new constitution the terms of police judges elected in November, 1893, did not begin until September 1, 1894, and the general assembly had no power to provide otherwise as to police judges of cities of the fourth class. *Tevlis v. Rice* ..528

POPULATION—

Recitals of statute as evidence of—SEE STATUTES, 13.

POSSESSION—

Where an estate is defeated by the breach of a condition subsequent in a deed the possession reverts to the grantors and they are entitled to rent from the time they demand possession and not merely from the time they make a re-entry by going upon the ground declaring a purpose to resume possession. *Griffith, &c., v. Owensboro, &c., R. Co.*139

Powers. Practice in Civil Cases.

POWERS—

The intention of the donor of a power is the great principle that governs in the construction of powers; and in furtherance of the object in view the courts will vary the form of executing the power, and, as the case may require, either enlarge a limited to a general power or cut down a general power to a particular purpose.

A power of appointment conferred by a mother upon her daughter by will was not absolute and unconditional, but was to be exercised only in the event "circumstances should alter." *Morgan, &c., v. Halsey, Trustee* 789

PRACTICE IN CIVIL CASES—

As to transfer of suits from one branch of Jefferson Circuit Court to another—SEE TRANSFER OF SUITS.

1. The confusion in the order of argument of counsel to the jury is not of sufficient importance to authorize the court to set aside the verdict. *Memphis, &c., Packet Co. v. Nagel* 9
2. A stockholder in a corporation may testify in chief for the corporation after persons having no interest in the corporation have given testimony in chief in its behalf. *Western District Warehouse Co. v. Hayes* 16
3. This court will not reverse upon the ground too short time was allowed for argument of counsel to the jury, unless satisfied the trial court has abused its discretion as to that matter.

Counsel were allowed upon the trial of appellant for murder three hours to each side, which, the contrary not appearing, this court must conclude was not so short time as to prejudice the substantial rights of the appellant. *Combs v. Commonwealth* 24

4. In an action to sell land upon ground it could not be divided without materially impairing its value, as the defendants were before the court only by constructive service of process, the court should have required proof of the allegation that the land could not be divided without materially impairing its value. *Perkins v. McCarley, &c.* 43
5. In cases of equitable cognizance, such as fraud or mistake, if the testimony preponderates for the one side or the other in such a way as to convince the court the chancellor below has erred, his judgment will be reversed, although it may not be flagrantly against the evidence. *Farmers' Bank of Kentucky v. Stapp* 432
6. An appeal to the circuit court in an equity case should be placed on the equity docket. *Mocquot v. Meadows* 543
7. This equitable action to enjoin the collection of a judgment hav-

PRACTICE IN CIVIL CASES—Continued.

ing been submitted on motion of plaintiff when no reply had been filed the chancellor did not abuse his discretion in overruling plaintiff's motion to set aside the submission, although it was supported by the affidavit of his attorneys to the effect that they did not know when they asked the submission that an answer had been filed. It is immaterial that the answer, which was due on the third day of the term at which it was tried, was not filed until a later day, as it was then filed in open court without objection. *Payton v. McQuown*, Adm'r757

PRACTICE IN CRIMINAL CASES—SEE CONTINUANCE.

As to failure of first grand jury to indict where examining court has held defendant over—SEE INDICTMENT, 3.

As to failure to indorse names of witnesses on indictment—SEE INDICTMENT, 5.

As to waiver of objection to indictment—SEE INDICTMENT, 3, 5.

As to jeopardy—SEE FORMER JEOPARDY.

1. The argument of the attorney for the Commonwealth in urging the jury by considerations of public policy to the enforcement of the criminal law and to the conviction of the accused was within the line of duty of a public prosecutor. *Breckinridge v. Commonwealth*267
2. Having been put upon his trial under a former indictment on charge of murder by a jury sworn to decide the issue between himself and the Commonwealth, defendant was entitled to a decision of that issue, which he could not have been arbitrarily deprived of by the court. *Gaskins v. Commonwealth*494
3. Two or more persons jointly indicted may testify for each other although a conspiracy is charged and proved. *Kidwell v. Commonwealth*538

PRAYER FOR RELIEF—SEE PLEADING, 1.

PRECATORY TRUSTS—SEE DEVISE, 7, 12.

PREFERENCE OF CREDITORS—SEE ASSIGNMENTS BY OPERATION OF LAW.

PREFERRED CLAIMS—

In distribution of estate under statute against preference by insolvent debtors—SEE TRUSTS, 1.

PREJUDICIAL ERRORS—SEE RAILROADS, 2, 5.

Prohibition, Railroads.

PROHIBITION—

As to power of Court of Appeals to grant writ of prohibition—
SEE COURT OF APPEALS.

PROTEST—

1. Notice of protest of bill sufficient. *Moreland's Ass'ee v. Citizens' Savings Bank*211
2. The fact that a notary public is the cashier of and a stockholder in a bank does not prevent him from protesting a bill held by the bank. *Moreland's Ass'ee v. Citizens' Savings Bank*.....211

PROXIMATE CAUSE—SEE RAILROADS, 10.

PUNITIVE DAMAGES—SEE DAMAGES, 1, 2, 6.

PURCHASERS—

As to duty to see to application of purchase money—SEE TRUSTS, 1.

1. An assignee for the benefit of creditors is not a purchaser for value. *Taylor, &c. v. Jones, &c.*.....201
2. Purchaser not disturbed where the court had jurisdiction, although proof should have been required that the land could not be divided without materially impairing its value. *Perkins, &c., v. McCarley, &c.* 43

RAILROADS—

As to right of railroad company to compel city to issue bonds where favorable vote has been taken—SEE TOWNS AND CITIES, 5.

1. A railroad company is guilty of wilful neglect in having an overhead bridge on its road under which brakemen on the top of freight trains can not pass without the exercise of more than ordinary care. *Cincinnati, &c. R. Co. v. Sampson's Adm'r.*..... 65
2. In an action against a railroad company to recover for the death of a brakeman resulting from his coming in contact with an overhead bridge, the defendant was not prejudiced by the action of the court in admitting testimony to the effect that the bridge had been raised by defendant since the accident, it being shown by the testimony for defendant that the bridge was too low for a brakeman to pass under without stooping. *Idem.*..... 65
3. In such an action the court properly refused an instruction as to contributory negligence. *Idem* 65
4. The court properly told the jury that the criterion of damages was the power of the decedent to earn money had he lived, not exceeding the amount claimed. *Idem* 65
5. The defendant was not prejudiced by the testimony of the widow that she had one child, as this condition of the decedent's family

Railroads.

RAILROADS—Continued.

- was not made an element of damage in any instruction to the jury. *Idem* 65
6. In this action against a railroad company to recover damages for injuries to plaintiff resulting from his being struck by a train of cars while he was walking on defendant's track, as the engineer admits he saw plaintiff when several hundred yards away, and believed from his movements he did not intend to leave the track until he reached a crossing some distance in front of him, the only issues were whether the danger signals were given in time to enable the plaintiff to step aside, and whether all reasonable means compatible with the safety of the passengers were used by the engineer to stop the train; and the court should, by its instructions, have confined the jury to these issues, and not have submitted the question as to the company's duty to keep a "look out," or as to plaintiff's knowledge of the approach of the train. *Newport News, &c. v. Deuser* 92
7. It is immaterial so far as plaintiff is concerned whether a whistle was blown for a crossing near by, and as there was some testimony tending to show this signal was not given, it was misleading to instruct the jury that it was the duty of defendant to give "timely warning" by bell or whistle of the approach of its train to such persons as happened to be on its tracks in front of its moving train, as the jury may have supposed this "timely warning" referred to the signal for the crossing. *Idem* 92
8. In thickly populated vicinities, where many persons are known to be constantly passing about and across the road, as in a large city, the public interest and a due regard for human life require a constant look-out and the giving of appropriate signals, such as blowing the whistle and ringing the bell. But the conditions to which that rule applies do not exist here. *Idem* 92
9. The unreasonable obstruction of a highway by a railroad train, being a public nuisance, does not give a right of action to a traveler on the highway who has been delayed by the obstruction, unless accompanied by some special damage. *Shields v. L. & N. R. Co.* 103
10. Plaintiffs, mother and daughter, having been delayed by a train of cars across a highway upon which they were driving, the fact that while thus delayed they were frightened by the disorderly conduct of passengers who had left the train and gone upon the highway, does not make the railroad company liable, as the obstruction of the highway was not the proximate cause of the injury, and the company had no power to prevent the disorder. Nor was the obstruction the proximate cause of an injury to one

Railroads.

RAILROADS—Continued.

- of plaintiffs resulting from her jumping from her buggy, although she claims that the danger of the buggy turning over, to avoid which she jumped, was caused by the darkness coming upon her in consequence of the delay. And no other special damage being claimed a peremptory instruction for defendant was proper. *Idem.*103
11. A railroad company is liable for the unlawful ejection of a passenger from one of its trains, although it had placed the train under the control of another for the purposes of an excursion. *Chesapeake, &c., R. Co. v. Osborne*112
 12. A verdict for \$1,000 for the ejection of a passenger from a railroad train is not, under the circumstances of this case, so excessive as to show that it was the result of passion or prejudice. *Idem.*....112
 13. Where passengers on the cars operated by one railroad company are injured by a collision with the cars of another company at a crossing of the two roads, and the former company is compelled to pay damages to its passengers for the injuries they have sustained, it can not look to the latter company for indemnity upon an allegation that the injuries were caused "wholly" by the negligence of the latter company. Failing to allege facts showing it was in fact liable as between it and its passengers, it will be regarded as one who has compensated the passengers for a wrong done them by another and then seeks to be substituted to their rights, which can not be done. *Cincinnati, &c., R. Co. v. L. & N. R. Co.*128
 14. Even though the carrier which has been compelled to respond in damages to its passengers was in fact liable, still it can not look to the other carrier for indemnity or contribution, unless it shows it was not an actual participant in the commission of the injury, the two companies being regarded as *in pari delicto* without regard to the relative degrees of their neglect. *Idem.*....128
 15. It is the duty of a railroad company to exercise the utmost degree of human care, diligence and skill in order to carry its passengers safely. But it is not an insurer of the life or person of the passenger, and can only be made liable on the ground it has failed to exercise this extraordinary care and diligence for his safety. *Idem.*128
 16. If the company seeking indemnity in this case were seeking to recover for the injury to its cars the fact that the injury was caused "wholly" by the negligence of defendant would be sufficient to entitle it to recover. *Idem.*128
 17. Where land was conveyed to a railroad company for the purpose of a depot, with a condition in the deed that if its use for

Railroads.

RAILROADS—Continued.

- that purpose should be discontinued the grantors should have the right to resume the possession, allowing the railroad company to remove its improvements, with the right to the railroad company however to acquire the fee-simple title to the land by paying its value at the date of the deed, if it should elect to do so, the railroad company having removed its depot, and failed to elect to pay the value of the ground, the possession reverted to the grantors, and they are entitled to rent from the time they demanded possession, and not merely from the time they made a re-entry by going upon the ground and declaring a purpose to resume possession. *Griffith &c., v. Owensboro, &c., R. Co.* ...139
18. The grantors were entitled to maintain an equitable action to have the effect of the deed declared and to recover rents. *Idem.*139
19. Where a city ordinance providing for the issual of bonds by the city in aid of a railroad company embraced a condition that the road should be completed within two years, excepting such delays as might be caused by "floods," the company is entitled to have deducted the time during which it was prevented by "high water" from making any progress, whether or not the water reached the height it had reached in noted floods. *Board of Trustees of Augusta v. Maysville, &c., R. Co.*145
20. Where the property and franchises of a railroad company incorporated in this State, which were by the charter of the company exempt from taxation, were purchased by a foreign railroad corporation, a statute conferring upon the purchaser all the "rights, privileges and powers" of its vendor can not be regarded as embracing the privilege of immunity from taxation. *Nashville, &c. R. Co. v. Commonwealth*162
21. Statute requiring railroad companies to provide water-closets at stations construed. *Louisville & Nashville R. Co. v. Commonwealth*207
22. Simple acquiescence on the part of a railroad company in the use of its tracks by the public as a passway does not confer authority or right, nor amount to license, to use them. *Brown's Adm'r v. L. & N. R. Co.*228
23. A trespasser on a railroad track who is struck and injured by a passing train can not complain that the train was too heavy, or the machinery insufficient, or that the train was imperfectly manned, as the company owes him no duty as to any of these things. The only duty which the company owes to a trespasser on the track is to use reasonable care to avoid injuring him after discovering his peril, and to keep a lookout in cities where per-

Railroads. Remainders.

RAILROADS—Continued.

- sons are likely to be found trespassing on its right of way.
Idem.228
24. Where a passenger on a railroad train who by reason of drunkenness is incapable of caring for himself is put off for refusal to pay his fare, and is soon after struck and killed by another train on the same road, the company is liable. *L. & N. R. Co. v. Ellis' Adm'r*330
25. In an action to recover for such a killing it was not competent for plaintiff to prove that the conductor said when he heard that a man had been killed on the track, that "he expected it was the man he put off the train," this declaration not being a part of the *res gestae*. *Idem.*330
26. The State may by injunction prevent a railroad company from consummating the purchase of a "parallel or competing line" in violation of sec. 201 of the State constitution. *L. & N. R. Co. v. Commonwealth*675
27. The word "parallel," as used in that section of the constitution was not used according to its strictly accurate meaning of two railroads constructed equi-distant apart through their whole extent, which would be impracticable, but in the sense of two conforming in their general direction. *Idem.*675
28. A clause in the charter of the Louisville & Nashville Railroad Company providing that the company may "from time to time extend any branch road and may purchase and hold any road constructed by another company or may agree on terms to receive the cars of other roads on their said road, but shall charge for same the usual freight," must be construed with reference to the subject matter, which was branch roads, and can not be regarded as conferring upon the corporation the power to purchase parallel and competing lines. *Idem*675
29. Even if the Louisville & Nashville Railroad Company had statutory power to purchase parallel and competing lines it would not have the power to purchase and hold the road of the Chesapeake, Ohio & Southwestern Company for the reason that the charter of the latter company prohibits consolidation of its capital stock with that of any other company whose lines are parallel and competing, as those of the Louisville & Nashville Company are. *Idem*675

RELIEF—SEE PLEADING, 1.

REMAINDERS—

As to sales of contingent remainders—SEE JUDICIAL SALES, 2.

REMEDIES—

The remedy intended to be provided by section 572 of Kentucky Statutes for a violation of its provisions was by indictment and fine and not by an action by the Commonwealth. *Commonwealth v. Jellico Coal Co.*245

RENTS—

1. Where an estate had been defeated by the breach of a condition subsequent in a deed, the grantors were entitled to rent from the time they demanded possession, and not merely from the time they made a re-entry by going upon the ground and declaring a purpose to resume possession. *Griffith, &c. v. Owensboro, &c. R. Co.*139
2. Where land of infant heirs sold for taxes was purchased by another for their benefit, an enforceable trust was created in their favor and they are entitled to have the land reconveyed to them and to recover reasonable rent. Nor can the plea of limitation defeat an action by them seeking that relief. *Vanbever v. Vanbever*344
3. Adjustment of rents and improvements where deed executed by trustee was set aside because of the failure of the maker of the trust to join with trustee in conveyance. *Halley, &c. v. Winchester Diamond Lodge*438

REPEAL OF STATUTES—SEE STATUTES, 3, 4, 7, 8, 14, 15, 16, 17, 18.

RESCISSION—

As to effect of rescission of contract for sale of personal property—SEE SALES.

1. Adjustment of rents and profits where deed executed by trustee was set aside for failure of maker of trust to unite with the trustee in the deed. *Halley, &c. v. Winchester Diamond Lodge*..438
2. Where holder of insurance policy, in ignorance of his legal rights, has been induced by fraudulent misrepresentations of company's agent to surrender part of his claim, the chancellor will rescind the contract by which the surrender was made. *Titus v. Rochester German Ins. Co.*567

RES GESTAE—SEE EVIDENCE, 13.

RES JUDICATA—

As to effect of judgment in suit involving settlement of guardian's accounts—SEE GUARDIAN AND WARD, 6.

As to effect of opinion on former appeal—SEE BILLS AND NOTES, 8.

Res Judicata. Robbery.

RES JUDICATA—Continued.

1. As the question as to whether plaintiff was a lawfully appointed administrator was made by defendant on affidavits and by preliminary motion in the court below, and was decided in favor of plaintiff, it was no longer an open issue proper to be made again in the same case between the same parties, and plaintiff was right in not accepting such issue and in introducing no evidence on same on the final trial. *Brown's Adm'r v. Lou. & Nash. R. Co.*228
2. Although a judgment against one of several persons united in interest was binding on him it was not binding on the others, who were not before the court, and a subsequent judgment in their favor inured to his benefit. *Morgan, &c. v. Halsey, Trustee.* 789
3. A judgment for defendant in an action against a railroad company to recover damages for personal injuries alleged to have resulted from defendant's negligence is a bar to a subsequent action against the same defendant to recover damages for the same injuries, although the specific acts of negligence alleged in the two petitions are different, there being but a single transaction. *McCain v. Lou. & Nash. R. Co.*804

RETROSPECTIVE LEGISLATION—SEE STATUTES, 4, 5.

REVERSIBLE ERRORS—

As to weight given judgment of chancellor—SEE APPEALS, 4.

1. Confusion in the order of argument of counsel to the jury, not sufficient to authorize the court to set aside the verdict. *Memphis, &c. Packet Co. v. Nagel* 9
2. The fact that a juror was under twenty-one years of age is not ground for setting aside verdict. *Combs v. Commonwealth*, 24
3. This court will not reverse upon the ground too short time was allowed for argument of counsel to the jury, unless satisfied the trial court has abused its discretion as to that matter. *Combs v. Commonwealth* 24

ROADS—

The unreasonable obstruction of a highway by a railroad train, being a public nuisance, does not give a right of action to a traveler on the highway who has been delayed by the obstruction, unless accompanied by some special damage. *Shields v. L. & N. R. Co.* 103

ROBBERY—

1. Robbery is the felonious taking of property from the person of another by force. *Breckinridge v. Commonwealth*267
2. An indictment for robbery which charges that the property was

Robbery. Self-defense.

ROBBERY—Continued.

feloniously taken from M against his will and by force and by presenting pistols and other weapons at him, and by putting him in the fear of immediate injury to his person, the property being at the time in his possession, is sufficient, although it does not expressly charge that the property was taken from the person of M, it being impossible to draw any other conclusion from the language used than that it was so taken. *Idem*.....267

SALES—

As to construction of devise forbidding sale of land—SEE DEVISE, 2.

As to sale by guardian of dead timber on ward's land—SEE GUARDIAN AND WARD, 2-4.

Where a merchant entered into a written contract, agreeing to purchase of a manufacturing company certain amounts of merchandise, and to use reasonable efforts to sell same, the company agreeing to furnish the goods at specified prices, the contract fixing the times of payment and providing that the failure of either party to comply with the conditions of the contract should be deemed sufficient cause for rescission, a rescission of the contract because the purchaser has put it out of his power to pay by making an assignment for the benefit of his creditors can only have the effect to release the company from obligation in the future, and can give it no right to recover goods already delivered, the title to the goods having passed upon delivery. *Holland's Assignee v. Cincinnati Desiccating Co.*454

SALES OF INFANTS' REAL ESTATE—SEE JUDICIAL SALES, 1, 2.

SCHOOLS—SEE COMMON SCHOOLS.

SELF-DEFENSE—

1. Proper instruction to jury upon trial for murder where testimony tended to show that the dwelling of accused was attacked by deceased with intention of having carnal knowledge of the wife of accused or of carrying her away for that purpose. *Saylor v. Commonwealth*184
2. It was error to qualify an instruction as to self-defense by telling the jury, in effect, that they could not acquit on that ground if they believed that defendant "brought on the difficulty" and sought the life of deceased, or to do him great bodily harm, there being no testimony on which to base such an instruction. *Starr v. Commonwealth*193
3. Upon the trial of a constable for murder the court should have given an instruction as to the right of an officer to carry arms

 Self-defense. Special Judges.

SELF-DEFENSE—Continued.

for his protection while in the discharge of his duties. *Idem.* 193

SEPARATE ESTATE—SEE HUSBAND AND WIFE, 2, 3.

SET-OFF—SEE COUNTER-CLAIM AND SET-OFF.

A bank has no right to set-off against a depositor's check the amount of an unmatured note which it holds against the depositor, although the depositor is insolvent and the bank will otherwise lose its debt. *Merchants' National Bank v. Robinson*552

SHERIFFS—

Where a sheriff is removed from office upon motion of his sureties, and the office declared vacant, the county court has power to appoint a collector of a railroad tax for a particular taxing district in the county, the appointment being authorized both by the special act levying the tax and by sec. 4131 of the Kentucky Statutes. And for the purpose of collecting such taxes the collector has the same powers as a sheriff, and is under the same liability. *Commonwealth v. Blackwell*314

SPECIAL JUDGES—

1. To make one eligible as special judge in a particular case it is not necessary that he should be a resident of the district in which the case is pending. *Breckinridge v. Commonwealth* .267
2. There are only two conditions in which the statute authorizes election of a special judge in either of the three branches of the Jefferson Circuit Court having jurisdiction of civil cases. The first is where a case has been once transferred, and the presiding judge of the branch to which the transfer is made can not sit. The other is where from any cause the presiding judge fails to attend; but not even in that case can there be a special judge if the judge of any other branch attends and holds the court for the occasion. *Hindman, &c., v. Toney*413
3. An order made by a special judge of the chancery branch of the Jefferson Circuit Court transferring to the common pleas branch an action in which he could not sit, while irregular, was not void. But whether void or not the question was entirely within province of the judge of the common pleas branch, and it was for him alone to decide how the case should be disposed of. *Idem.* ...413
4. A special judge of one of the divisions of the Jefferson Circuit Court has no right to participate with the judges of the other divisions in the election of an indexer, as the statute authorizing the election of a special judge was not intended to confer upon the attor-

Special Judges. Statutes.

SPECIAL JUDGES—Continued.

ney thus elected any power except such as is necessary to hold court for the occasion. *Roberts v. Cain*722

STATE—

As to validity of contract by State exempting banks from municipal taxation—*SEE TAXATION*, 8.

1. While an action nominally against an officer, but really against the State, to enforce performance of its obligation in its political capacity, can not be maintained, yet officers or agents holding and controlling property of the State, such as an insane asylum, may be enjoined from so using such property as to create a nuisance whereby the health or property of others will be injured. *Herr, &c., v. Central Kentucky Lunatic Asylum*458
2. The State may by injunction prevent a railroad company from exceeding its chartered powers or doing acts otherwise illegal and injurious to the public. *L. & N. R. Co. v. Commonwealth* ...675

STATUTES—

As to title of act—*SEE CONSTITUTIONAL LAW*, 1, 15.

As to sections of Kentucky Statutes construed—*SEE KENTUCKY STATUTES*.

As to sections of Codes of Practice construed—*SEE CODES OF PRACTICE*.

1. When a public power for the public benefit is conferred by a statute in enabling terms a duty is impliedly imposed to exercise it whenever the occasion arises. Therefore when a statute provides that a city "may issue bonds" in aid of a railroad company, provided a majority of the voters of the city shall vote in favor thereof at an election held for that purpose, a favorable vote having been had, the city has no discretion in the matter, the statute being regarded as compulsory. *Board of Trustees of Augusta v. Maysville, &c. R. Co.*145
2. Where the legislature enacts a law in substantially the same language as a former law upon the same subject, it must be presumed to have accepted the construction given the old law by the persons charged with its enforcement.
Breckinridge v. Commonwealth267
Commonwealth v. Grand Central B. & L. Ass'n325
3. The provision of the charter of towns of the sixth class conferring upon the trustees the exclusive power to regulate the sale of liquor therein did not have the effect to repeal the general local option law as to such towns. *Cooper, County Clerk, v. Shelton*282
4. Change in tax law does not release taxes assessed under former

Statutes.

STATUTES—Continued.

- law, or destroy any of the existing remedies for their recovery.
Long v. City of Louisville364
5. Neither constitutions nor statutes should be given a retrospective operation unless the language used clearly shows such an intention. *Idem*364
 6. The expression "eligible to election" being used in some parts of the constitution and the expression "eligible to office" in others, it is to be presumed that by the difference in expression a difference in meaning was intended. *Kirkpatrick v. Brownfield*..558
 7. A local or special law fixing six months as the period of limitation as to actions for damages against a particular city had the effect, as to such actions against the city, to repeal the provision of the general law fixing twelve months as the period of limitation, but did not operate to repeal the saving of the general law in favor of infants by which limitation as to them runs only from the time of the removal of their disability. *City of Louisville v. Garr by &c.*583
 8. The power of the legislature to repeal an act does not carry with it the power to annul a contract made under the act. *Bank Tax Cases*590
 9. In construing statutes words may be modified, altered or supplied so as to obviate any inconsistency with the intention of the legislature as collected from the subject matter and object of the statute, and all words, if they be general, and not expressed and precise, should be restricted to the fitness of the matter.
 A provision in the charter of a railroad company conferring upon it the power to extend any branch road and purchase and hold any road constructed by another company must be construed with reference to the subject matter, which was branch roads, and can not be construed as conferring power to purchase parallel and competing lines. *L. & N. R. Co. v. Commonwealth*675
 10. The word *parallel* as used in constitution in reference to railroads held to be used in sense of conforming in general direction and not according to its strictly accurate meaning. *Idem*.....675
 11. Statutes are sometimes extended to cases not within the letter of them and cases are sometimes excluded from the operation of statutes though within the letter, it being an acknowledged rule in the construction of statutes that the intention of the makers ought to be regarded.
 Statute requiring a corporation who is a plaintiff to give bond for costs does not apply to apply to public corporations such as the trustees of a common school district. *Trustees of Common School District v. City of Flemingsburg*702

Statutes. Streams.

STATUTES—Continued.

12. As against the Commonwealth and as against the person for whose relief a statute was passed, the statute is evidence of the facts which it recites, but it is not evidence as against strangers. *Commonwealth v. Chinn, &c.*730
13. The fact that a county has been created by the legislature a separate judicial district under sec. 138 of the constitution, which requires that the county shall have a population of forty thousand in order that this may be done, is not evidence that the county has that great a population except for the purpose of upholding that particular statute. *Idem*730
14. Neither general nor local prohibitory liquor laws which were in force at the time of the adoption of the constitution were repealed by that instrument. *Brann v. Hart, &c.*735
15. Act of May 22, 1890, by which the mayor of the city of Louisville was directed to cause to be issued bonds of the city to a certain amount for the purpose of calling in bonds theretofore issued, was not repealed by section 3010 of the Kentucky Statutes. *Farson, Leach & Co. v. Board of Commissioners of Sinking Fund of City of Louisville*120
16. The local act passed May 3, 1890, authorizing the Fayette County Court to purchase turnpikes and issue bonds in payment therefor, has not been repealed either by the constitution or by the various provisions on the subject of turnpikes now found in the Kentucky Statutes. *O'Mahoney v. Bullock, &c.*774
17. The principles determined in *Broadbuss v. Broadbuss*, 10 Bush, 299, have no application here. The book entitled "The Kentucky Statutes" is not a revision of the laws of the Commonwealth, but merely a collection of them, and each act speaks for itself with respect to its effect on prior acts. *Idem*774
18. The provision of sec. 171 of the constitution that "all taxes shall be levied and collected by general laws" does not render inoperative a local act providing for the levy and collection of taxes for a special purpose, for if that provision has any application to such a state of case, the General Assembly having since the adoption of the constitution provided by general laws how all taxes may be levied and collected in behalf of the various counties, these general laws may be considered as amending or repealing the special provisions in the local act. *Idem*.....774

STOCKHOLDERS—SEE CORPORATIONS, 1.

STREAMS—

Maintenance of a dam across a stream will be enjoined where it

Streams. Streets.

STREAMS—Continued.

creates a nuisance resulting in injury to health and property.
 Herr, &c., v. Central Kentucky Lunatic Asylum 458

STREET IMPROVEMENTS—

1. Under the amendment of February 20, 1873, to the charter of the city of Louisville, the relative location of the fourths of squares, and not of the lots, determines what property is liable to assessment for the improvement of any public way, whether it be a street or an alley. And no lot is liable to assessment for such improvement unless the fourth of a square in which it lies is contiguous to the improved way. Washle, &c., v. Nehan 351
2. In apportioning the cost of street improvements in the interior of a square, the general rule is that the cost must be borne by all the property owners within the four quarters of the square; and under this rule the word "square" is ordinarily construed as meaning any subdivision of territory surrounded on all sides by principal streets. But there are exceptions to this rule, and this definition of the word "square" is not of universal application. Each case must be largely considered and disposed of upon its own peculiar facts, one of the cardinal and controlling considerations underlying the whole question being based upon the idea that the property benefited by the improvement should bear the expense. Dumesnil, &c., v. Shanks, &c. 354
3. While this court has held that where the alley improved lies wholly within one of the quarter squares the other three-quarters can not be required to pay any part of the cost, thus establishing an exception to the general rule, it does not follow that in every case where it lies wholly within two-quarters of the square those two-quarters alone must pay for it. *Idem*..... 354

STREETS—

1. Without some legislative authority a city has no power either to condemn or close streets or alleys; and where a mode is pointed out in the charter for closing streets and alleys that mode must be regarded as exclusive.

Under the charter of the city of Louisville, which authorized the court, in an action instituted by the city for that purpose, to decree the closing of a street or alley, "if satisfied that the closing up would be beneficial to said city and not injurious to any party not consenting," the court had no power to order the closing of an alley where it appeared that damage would result to property owners not consenting to the closing, even though compensation was made. Martin, &c. v. City of Louisville..... 30

Streets. Tax Collectors.

STREETS—Continued.

2. A corporation, whether municipal or private, seeking to appropriate a street or alley to its use must resort to the writ of *ad quod damnum*, and under it compensate the owner for the injury sustained. But the city can not even in that way close a street or alley unless it be for the purpose of appropriating it to some municipal or public use. *Idem* 30
3. It is the duty of a city to keep its streets reasonably safe for public travel; and it is liable for injuries resulting from obstructions in the street of which it has had notice, or of which it may reasonably be presumed to have had notice from the length of time the obstruction has existed. And while a city may temporarily place obstructions on a street for the purpose of making repairs, yet this is permitted only as a matter of necessity and for only a reasonable time. *Fugate v. City of Somerset* 48
4. Whether the city was under obligation to erect a fence or other barrier along the embankment depends upon whether or not the street was reasonably safe for travel without this fence, and this is a question for the jury. *Idem* 48

SUBMISSION—

As to submission under mistaken belief that no answer had been filed—SEE PRACTICE IN CIVIL CASES, 7. ,

SURETIES—

1. Where one who is solvent qualifies as administrator of the estate of his creditor, or as the guardian of infants to whom he is indebted, the amount of the debt must be treated as cash assets coming to his hands for the proper disposition of which the sureties in his bond are liable. And the fact that one of several sureties in his bond is surety in the note by which the debt is evidenced, does not make that surety liable for the entire debt as between him and the other sureties. *Johnson v. Hicks' Guardian* 116
2. Surety released by failure of bank to apply principal's deposit to payment of his note made payable at and discounted by the bank. *Pursifull v. Pineville Banking Co.* 154

SURPRISE—

New trial granted for surprise—SEE NEW TRIAL.

TAX COLLECTORS—

1. Where a sheriff is removed from office upon motion of his sureties, and the office declared vacant, the county court has power to appoint a collector of a railroad tax for a particular taxing district

Tax Collectors. Taxation.

TAX COLLECTORS—Continued.

- in the county, the appointment being authorized both by the special act levying the tax and by sec. 4131 of the Kentucky Statutes. And for the purpose of collecting such taxes the collector has the powers a sheriff would have, and is under the same liability. *Commonwealth v. Blackwell*314
2. The law authorizes the appointment of a collector for any taxing district as well as for the entire county, and it is not required that the collector shall be a resident of the district in which the taxes are to be collected, he not being a "district officer" within the meaning of sec. 234 of the constitution. *Idem.*314

TAX SALES—

- Where land of infant heirs sold for taxes was purchased by their uncle for their benefit, it being publicly announced that his bid was for the benefit of the children, an enforceable trust was created in their favor, and the plea of limitation can not defeat an action by them to have the land reconveyed to them and to recover rent. *Vanbever v. Vanbever*344

TAXATION—

As to assessment for street improvements—SEE STREET IMPROVEMENTS.

1. To entitle a purchaser or successor to benefit of an immunity from taxation granted to the vendor or predecessor the intention of the legislature to continue the privilege must be clear and express.
- Where a foreign railroad corporation which purchased the property and franchise of a railroad company incorporated in this State was "incorporated under the laws of this State and clothed with all the rights, privileges and powers" embraced in the charter of the vendor, the "rights, privileges and powers" thus conferred can not be regarded as embracing the privilege of immunity from taxation embraced in the vendor's charter. *Nashville, &c., R. Co. v. Commonwealth*162
2. Neither the new constitution nor the charter for cities of the first class, passed July 1, 1893, was intended to release taxes assessed under the charter of the city of Louisville theretofore in force, or to destroy any of the existing remedies for their recovery, and, therefore, as to all outstanding unpaid taxes assessed and levied by the city of Louisville prior to July 1, 1893, the remedies theretofore provided for their collection and recovery may still be invoked. *Long, &c., v. City of Louisville*364
3. Neither the legislature nor a municipal corporation can classify

Taxation.

TAXATION—Continued.

- property for taxation, or substitute a license tax for an *ad valorem* tax. If a license tax is imposed upon a business it must be in addition to, and not in lieu of, an *ad valorem* tax upon the property employed in the business. *Levi v. City of Louisville*394
4. A license tax within the meaning of the constitution is not a burden on property, but on that which results from its enjoyment, or the conduct of the business or calling. *Idem.*394
 5. The provision of the constitution prohibiting the legislature from imposing taxes on or for municipalities was not intended to leave the entire mode of assessment to the discretion of the general council, but merely to prohibit the legislature from determining the amount to be imposed and the objects to which it should be applied. *Idem.*394
 6. The omission of the general council of the city of Louisville to impose an *ad valorem* tax for a certain year upon personal property used in any business upon which a license tax was imposed, is not such an irregularity or mistake as renders the entire ordinance void, as the legal part of the levy can be separated from the illegal; and, therefore, as the plaintiffs in these cases have been legally taxed they are not entitled to an injunction because of the irregularity. But as the mode of taxation does produce a discrimination against them, a court of equity should grant them relief by requiring the city government to correct the levy ordinance and assess the omitted property. But where the license fees which have been paid are so large as to indicate an intention to embrace the value of the property, they should be credited on the tax bill when collecting on the *ad valorem* system. *Idem.* 394
 7. If this were the case of an assessment for a local improvement, and not a levy for the revenue upon which the maintenance of the city government depends, the wrongful levy or assessment would authorize the interference of the chancellor by injunction. *Idem.*394
 8. The written acceptance by the various banks of the State of the provisions of the Hewitt law, under which they were to pay into the State Treasury a certain tax in full of all tax, State, county and municipal, constituted an irrevocable contract between the banks and the State, some of the banks having thereby surrendered the right which they had under their charters to pay into the State Treasury a still smaller rate of taxation in lieu of all other taxes; and, therefore, the banks which entered into that contract are exempt from taxation by the counties, towns and cities of the State, the provisions of the present revenue law authorizing such taxation being in violation of the provisions of the Federal con-
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TAXATION—Continued.

- stitution that "no State shall pass any law impairing the obligation of contracts." Commonwealth, for use, &c., v. Farmers' Bank of Kentucky590
9. While under our present constitution the State has no power to make such a contract, yet under the former constitution this power existed, and property might not only be classified in imposing taxation, but the State could discriminate between the classes when providing the rate of taxation. *Idem.*590
10. The provision of sec. 171 of the constitution that "all taxes shall be levied and collected by general laws" does not render inoperative a local act providing for the levy and collection of taxes for a special purpose. *O'Mahoney v. Bullock, &c.*774

TITLE—

As to passing of title to personal property—SEE SALES.

TORTS—

As to contribution between joint wrong-doers—SEE RAILROADS, 13, 14.

TOWNS AND CITIES—

As to right of city to recover back money paid under mistake—SEE MISTAKE.

As to power to close streets and alleys—SEE STREETS, 1, 2.

As to duty to keep streets in repair—SEE STREETS, 3, 4.

As to sufficiency of title of act to amend city charter—SEE CONSTITUTIONAL LAW, 1.

As to municipal taxation—SEE TAXATION, 2, 7.

As to election and terms of city officers—SEE ELECTIONS.

As to continuance of charters in force by new constitution—SEE ELECTIONS, 11.

1. When bonds are issued by a city for the express purpose of retiring or taking the place of other outstanding bonds of the city, the amount represented by them is not to be considered as an increase of the city's indebtedness in estimating the amount of indebtedness which it may incur under the limit fixed by sec. 158 of the constitution. *Farson, Leach & Co. v. Board of Commissioners of Sinking Fund of City of Louisville*119
2. Even if the indebtedness represented by the bonds in question here had in fact increased the aggregate indebtedness of the city to an amount in excess of the constitutional limit, yet the fact that it was authorized under an act passed prior to the adoption of the constitution would protect it under a proviso of sec. 158 of

Towns and Cities.

TOWNS AND CITIES—Continued.

- the constitution to the effect that an indebtedness in excess of the limit fixed may be contracted "when the same has been authorized under laws in force prior to the adoption of the constitution." *Idem*119
3. The act of May 22, 1890, by which the mayor of the city of Louisville was directed to cause to be issued bonds of the city to a certain amount for the purpose of calling in certain bonds theretofore issued, was not repealed by sec. 3010 of the Kentucky Statutes. *Idem*119
 4. A city may make its bonds payable in gold, although the act authorizing them to be issued is silent upon that subject. There is embraced by every such grant of power not only the powers conferred in express words, but those fairly implied in, or incident to, the powers expressly granted. *Idem*119
 5. When a statute provides that a city council "may issue bonds" of the city to a certain amount in aid of any railway company that will construct a railway through the city, provided a majority of the voters of the city shall vote in favor thereof at an election held for that purpose, and pursuant to the statute a favorable vote has been had under an ordinance providing that the bonds are not to issue until the road is built, that condition having been complied with the company is entitled to the bonds without any further contract or subscription upon the part of the city, and the city has no discretion in the matter. The words "may issue bonds," as used in the act, are to be regarded as compulsory and not as permissive merely. *Board of Trustees of Augusta v. Maysville, &c. R. Co.*145
 6. Under section 160 of the constitution, the General Assembly has power to provide as to cities of the fourth class, as it has done, that councilmen "shall be elected by a majority of the votes cast by the qualified voters of the wards for which they respectively stand." *Brown, &c. v. Holland, &c.*249
 7. The charter for cities of the fourth class recognizes the existence of wards in such cities, and in effect continues the ward divisions existing under old charters. *Idem*249
 8. Under section 160 of the constitution, which provides that mayors of towns of the fourth, fifth and sixth classes "may be elected or appointed, as provided by law," the legislature has power to provide, as it has done as to cities of the fourth class, that "the mayor may be selected by the people or appointed by the council, as may be provided by ordinance." *Idem*.....249
 9. As the constitution permitted, and the act for the government of cities of the fourth class required, the election of councilmen by

 Towns and Cities. Transfer of Suits.

TOWNS AND CITIES—Continued.

- the voters of each ward, and the city council in the absence of any specific directions by the General Assembly as to how these ward elections were to be held did all in its power to comply with the constitution and the act, both the council and the county judge appointing the officers to hold the elections in the respective wards as required by the charter, and the city clerk furnishing the ballots under authority of the council upon the refusal of the county clerk to do so, these irregularities did not invalidate the election. *Idem*249
10. In these actions to prevent the usurpation of the offices of mayor and councilmen, in which the plaintiffs ask judgment placing them in possession of the offices which they respectively claim, plaintiffs must recover upon the strength of their own titles, and have no interest in the settlement of any question which merely affects the titles of the defendants without giving validity to their own titles. *Idem*249
11. The provision of the charter of towns of sixth class conferring upon the trustees the exclusive power to regulate the sale of liquor therein did not have the effect to repeal the local option law as to such towns. *Cooper, County Clerk, v. Shelton*282
12. Where a city ordinance was passed providing for the annexation to the city of an adjoining town, and certain residents of the town filed a petition in the circuit court protesting against the annexation, the burden of proof was upon the petitioners, and they were entitled to the concluding argument to the jury. The fact that the court found at the conclusion of the testimony that the required per cent. of the resident free-holders of the territory proposed to be annexed had remonstrated did not change the burden of proof. *Kentucky Wagon Mfg. Co. v. City of Louisville*548
13. Taxpayers and residents of the city were not disqualified, by reason of their interest, to act as jurors, their interest being necessarily remote, uncertain and insignificant. *Idem*548
14. City liable for injuries resulting from collision caused by defective construction of bridge. *City of Louisville v. Garr, by, &c.*583

TRANSFER OF SUITS—

1. Proper practice where a special judge of one of the branches of the Jefferson Circuit Court can not sit in an action. *Hindman, &c., v. Toney*413
2. An order made by a special judge of the chancery branch of the Jefferson Circuit Court transferring an action directly to the

Transfer of Suits. Trusts.

TRANSFER OF SUITS—Continued.

- common pleas branch, while irregular, was not void. But whether void or not the question was entirely within the province of the judge of the common pleas branch, and it was for him alone to decide how the case should be disposed of. *Idem*.....413
3. Even if the order of the law and equity branch compelling the clerk by mandamus to determine by lot how the case should be disposed of was valid, the mode adopted by the clerk of determining to which of the two branches the case should be transferred was improper, even according to rule 19 of the court, which authorized determination by lot of the single question to which court that particular action should be transferred, without regard to assignment of other cases. *Idem*.413

TRESPASS—

As to duty of railroad company to trespassers on tracks—SEE RAILROADS, 6, 7, 8, 23.

1. For a mere trespass where the recovery in damages will fully compensate for the wrong, a court of equity will not interfere; but the rule is different where the trespasses are continual, and must result in a multiplicity of suits, and particularly where the wrong complained of is the assertion of a right not only hostile to the claim of the real owner, but that by its exercise will give the wrongdoer by the use and claim such a right as will deprive the real owner of title. *McCloskey, Bishop, v. Doherty, &c.*300
2. Where the land is in the possession of tenants the right of action for a mere entry on the possession without any injury to the freehold is in them and not in the landlord. But where there is an injury to the freehold the rule is different, as by express provision of statute the owner of land may maintain an action to recover damages for any trespass committed thereon, or to prevent any trespass thereon, although he may not have the actual possession at the time of the trespass. (*Ky. Stats., sec. 2361.*) *Idem*.300

TRUSTS—

As to precatory trusts—SEE DEVISE, 7, 12.

1. Where a purchaser of land was by a judgment of court made a trustee for the investment of the purchase money for the benefit of others, the beneficiaries had an equitable lien upon the land to secure the investment, and the trustee having failed to make the investment, in the distribution of her estate under the statute against preferences by insolvent debtors the beneficiaries are entitled to have their lien enforced, there being no valid mort-

Trusts. Unsound Mind.

TRUSTS—Continued.

- gage liens upon the land. But this debt is not a preferred claim under the statute (sec. 7, art. 2, chap. 44, Gen. Stats.), because the trust was not created by deed or will. Nor is it a lien for purchase money. And while it was asserted merely as a preferred claim, the equitable lien may be enforced under the prayer for general relief. *Finnell, &c., v. Higginbotham, Trustee* 21
2. Where the land of infant heirs sold for taxes was purchased by their uncle for their benefit, it being publicly so announced, an enforceable trust was created in their favor, and the plea of limitation is not available against an action by them to have the land reconveyed to them and to recover rent. *Vanbever v. Vanbever* 344
3. Adjustment of rents and improvements where deed executed by trustee was set aside for failure of maker of trust to join with the trustee in the deed. *Halley, &c. v. Winchester Diamond Lodge* 438
4. The court is inclined to the opinion that statute requiring maker of trust to unite with trustee in deed does not apply to a deed executed by a trustee for creditors where the wife of the debtor was required to join with him in the deed creating the trust, thus indicating a purpose on their part to surrender all interest in the property and in the execution of the trust. *Halley, &c. v. Winchester Diamond Lodge* 438
5. When a father buys and pays for land taking a conveyance to himself, declaring by parol that he holds the land in trust for his son, whom he allows to occupy it as a home, but dies leaving a will devising the land to others, the parol declarations of the father do not create an enforceable trust in favor of the son or his heirs. *Sherley v. Sherley, &c.* 512

TURNPIKES—

As to purchase of by counties—SEE STATUTES, 16.

ULTRA VIRES—

- A corporation must account for benefits which it has received under an *ultra vires* transaction. Therefore, where it has used the proceeds of a note in its business it can not escape liability on the note upon the ground that its president had no power to discount the paper. *German Nat'l Bank v. Butchers' Hide and Tallow Co.* 34

UNSOUND MIND—SEE IMBECILES.

Usury. Vendor and Vendee.

USURY—

When land was conveyed in discharge of a debt any usury embraced in the debt was then paid, and the right to recover the usury is barred by limitation, more than one year having elapsed. *Tyget, &c. v. Potter & Co.* 54

VACANCIES—

As to filling vacancies in office—SEE ELECTIONS, 2, 3, 4.

As to appointment of tax collector where sheriff has been removed—SEE SHERIFFS.

VARIANCE—

As to variance between allegation and proof—SEE INDICTMENT, 2, 6, 7.

VENDOR AND VENDEE—

1. Adjustment of rents and profits where deed executed by trustee was set aside for failure of maker of trust to unite with the trustee in the deed. *Halley, &c. v. Winchester Diamond Lodge*... 438
2. Under a deed of general warranty reciting in one part that the land is to be paid for at a certain price per acre "on settlement of the acreage of a good title," and in another part that it is to be paid for "as soon as acreage of clear title can be determined so as to ascertain amount yet due," the vendee is not bound, as is the general rule in case of an executed contract of sale and purchase of land, to rely upon warranty of title and await eviction before resisting recovery of purchase money, but he has the right, in this action to recover the purchase money, to make the issue and defeat the recovery in case the vendor does not show a good or clear title to the land sold, or to the extent he so fails. *American Association (Limited) v. Short* 502
3. Where a vendee, having resold the property, procured his vendor to make deed directly to the purchaser with covenants of warranty, the vendor having been made liable to the grantee upon the warranty, was entitled to recover of his vendee the amount thus recovered from him, together with reasonable counsel fees, he having, by his contract with his vendee, expressly refused to make such a warranty. *Edmunds v. Deppen* 661
4. A covenant of general warranty in a deed to land is equivalent in substance to the several special covenants in use under the common law, as that the grantor is seized of the land sold, that he has good and perfect right to convey, that the land is free from incumbrances, that the grantee shall quietly enjoy possession and that the grantor will warrant and defend the title against all

Vendor and Vendee. Waiver.

VENDOR AND VENDEE—Continued.

- claims of all persons. Therefore, such a covenant is sufficient to compel the grantor before receiving the full amount of the purchase money to pay off and discharge all outstanding unpaid liens on the property. *Smith v. Jones, &c.* 670
5. Where a vendee is in possession of land under a deed of general warranty and the vendor is solvent the vendee can not resist the payment of the purchase money, although there may be a defect in the title, provided the vendor acted in good faith. *Idem.*.. 670

VENUE—

As to jurisdiction to determine custody of children—SEE JURISDICTION.

1. An action under subsec. 2 of sec. 490, Civil Code, for the sale of land owned jointly by plaintiffs and defendants as devisees under a will, and for a distribution of the proceeds, upon the ground that the property could not be divided without materially impairing its value, was properly brought in the county in which the land was situated although that was not the county in which the personal representative of the testator qualified. The venue of such action is fixed by subsec. 3 of sec. 62, and not by sec. 66 of the Civil Code. *Perkins, &c. v. McCarley, &c.* 43
2. The jurisdiction of a penal action in the name of the Commonwealth against a corporation to recover the penalty prescribed for doing business in this State without complying with the provisions of sec. 571 of the Kentucky Statutes, is in the circuit court of the county in which the offense is committed. Therefore, the Franklin Circuit Court has no jurisdiction of such an action, unless the offense was committed in Franklin county. *Commonwealth v. Grand Central B. & L. Ass'n.*..... 325

VERDICTS—

1. Verdict for \$1,000 for ejection of passenger from railroad train not excessive. *Chesapeake, &c. R. Co. v. Osborne* 112
2. To give the county court jurisdiction to take from a person his estate upon the ground that he is incompetent to manage it, the reason or cause of the infirmity as well as what estate is owned by the subject of the inquest must be made to appear by the verdict. *Menifee, Committee, v. Ends* 388
3. Verdict for \$500 not excessive for injuries to small boy whereby his general health was impaired. *Ky. Hotel Co. v. Camp.*..... 424

WAIVER—

As to waiver of objection to indictment—SEE INDICTMENT, 3, 5.

Warehousemen. Wills.

WAREHOUSEMEN—

As to duty to insure tobacco on storage—**SEE CUSTOM.**

WARNING ORDER—

It is sufficient to state in an affidavit for a warning order the post-office address of the non-resident defendant without following literally the requirement of the Code that the affidavit shall state "the name of the place wherein a postoffice is kept nearest to the place where the defendant resides or may be found." *Perkins, &c. v. McCarley, &c.* 43

WARRANTY—

As to liability where vendor makes deed directly to purchaser from his vendee—**SEE VENDOR AND VENDEE, 3.**

1. A covenant of general warranty in a deed to land is equivalent in substance to the several special covenants in use under the common law, as that the grantor is seized of the land sold, that he has good and perfect right to convey, that the land is free from incumbrances, that the grantee shall quietly enjoy possession and that the grantor will warrant and defend the title against all claims of all persons. Therefore, such a covenant is sufficient to compel the grantor before receiving the full amount of the purchase money to pay off and discharge all outstanding unpaid liens on the property. *Smith v. Jones, &c.* 670
2. Where a vendee is in possession of land under a deed of general warranty and the vendor is solvent the vendee can not resist the payment of the purchase money, although there may be a defect in the title, provided the vendor acted in good faith. *Idem*... 670

WATER-CLOSETS—

Statute requiring railroad companies to provide water-closets at stations construed. *Lou. & Nashville R. Co. v. Commonwealth*... 207

WATER-COURSES—

Maintenance of a dam across a stream will be enjoined where it creates a nuisance resulting in injury to health and property. *Herr &c. v. Central Ky. Lunatic Asylum* 458

WILLS—

As to construction of—**SEE DEVISE.**

In a suit brought by a trustee for the construction of a will a judgment directing him to do certain things in execution of the provisions of the will was not a final judgment, and was not conclusive as to the validity of the will. *Morgan, &c. v. Halsey, Trustee* 789

 Witnesses.

WITNESSES—

As to contradiction of—SEE EVIDENCE, 12.

1. Before impeaching by general evidence the credit for veracity of a witness it must be shown by the impeaching witness that he knows the general reputation of the person in question among his neighbors, or what is generally said of him by those among whom he dwells or with whom he is chiefly conversant; and the impeaching testimony must relate to his reputation among such persons. It was not competent, therefore, in this case to show the bad reputation of a witness in a county in which he had not resided, and among the people whom it did not appear were his neighbors. *Combs v. Commonwealth* 24
2. In a suit by the wife against the husband upon a note executed by him to her he was not a competent witness against the wife in support of the averments of his answer. *Leahy v. Leahy* 59
3. Where the accused testifies for himself he may be subjected to the same kind of cross-examination as any other witness, but he can not be compelled to give evidence against himself except as to the charge under consideration, and therefore, can not be required to admit the commission of other offenses which would subject him to punishment, presentment or infamy. *Saylor v. Commonwealth* 184
4. Two or more persons jointly indicted may testify for each other, although a conspiracy is charged in the indictment and proved. *Kidwell v. Commonwealth* 538



